EQUITY CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH-CAROLINA.

JUNE TERM, 1831.

RICHARD ARNOLD *et al.*

v.

DANIEL BLACKWELL AND GEORGE BYARS.

Upon a reference of an executor's account to the clerk, he has power to determine, whether a slave was the property of the testator or the executor.

This cause was removed from Rutherford. The plaintiffs were the residuary legatees of *Joel Blackwell*, who died in 1821, and the defendants were his executors. The bill, filed in 1828, charged that they had converted a considerable portion of the estate of their testator to their own use, denying that it was a part of the assets—particularly, that the defendant, *Blackwell*, claimed a valuable negro man, under a bill of sale from the testator, which the plaintiffs alleged was either fraudulently obtained, or fraudulently set up as title—that the defendant was the general agent of his father, the testator, who was old, infirm and intemperate—that when drunk, the testator had agreed to sell this slave to a neighbour, one *Simmons*, for a small price; and in order to avoid performance of the contract, the defendant, *Blackwell*, persuaded the testator to execute a bill of sale for the slave to him, and antedate it, so as to overrun the date of the sale to *Simmons*, and thereby induce the purcha-

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ment to a legatee, or distributee, is not a disbursement within the meaning of the act of Assembly giving them, and receiving a debt from himself is not a collection, upon which they are allowed to an executor. But there is a second ground of objection, which must prove fatal to the defendant, *Blackwell*. Commissions are allowed on fair transactions, and to honest and faithful agents. I speak now exclusively of the defendant, *Blackwell*, who was willing, from his own answer, to join with (and the probability is, to advise) his poor, old, superannuated father, to cheat *Simmons*, by antedating his bill of sale, and now fraudulently uses it against the old man. If he means, that commissions were not allowed on his former settlement, this is not a proper time to bring forward the claim. The presumption is, that they have been allowed, or the claim brought forward and rejected. But it appears, that heretofore, when a settlement of his accounts was made, by commissioners under an order of the County Court, the sum of thirty five dollars was allowed the executors for the payment of debts, and as compensation for services rendered before the division. And it is now eight or ten years since they ought to have settled their accounts. This exception is therefore overruled.

Executors are not entitled to commissions on debts due from themselves to the testator, nor upon payments to legatees.

Neither are they allowed to a dishonest executor.

Strictly speaking, we ought perhaps also to disallow the fourth exception, in favor of *Byars*, the other executor, in regard to the female slave. But as he says he never acted on the estate, and as this bill is in its frame rather a bill to surcharge and falsify, and all the specific charges are against the other defendant, and nothing is alleged as to the administration of *Byars*, except by general words, he might suppose that he was joined only for conformity, and may have been surprized by that charge. We will therefore refer the case again to the clerk on that point. The report is therefore confirmed, except as to the charge of $800, against the defendant *Byars*, as to which it is again referred to the clerk, with power to examine the parties on oath, and to hear such proof as they may offer and report to this court.

DECREE: It appears from the report, that there is in the hands of the defendant *Blackwell*, exclusive of such interest as may be due thereon, the sum of five hundred and forty eight dollars, principal, decree, that he pay the same with interest thereon, to be computed by the clerk of this court, at the rate of six per cent *per annum*, from the time of the death of the testator, taking the time of his death, from the admission in the defendant's answer. And that in default of such payment that execution issue therefor. Let the defendant *Blackwell* pay all the costs of this suit, except the costs of the defendant *Byars*, which are reserved for further order.

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JOHN SPEIGHT *v.* REDDICK GATLING *et al.*

A testator is presumed not to die intestate as to any part of his estate; and hence, where there is a residuary clause, all his property, not specifically bequeathed, passes under it.

This cause was removed from Gates. The plaintiff alleged, that *Joseph Speight*, died in the year 1792, leaving a will, whereby he devised as follows: "I lend "to my beloved wife, *Anne Speight*, during her natural "life, one half of the land and plantation whereon I now "live, also five negroes, viz. &c. also three horses, &c." That after giving the bulk of his estate to his sons *Francis* and *Henry*, "and their heirs and assigns forever," he bequeathed twelve shillings to his grand-children *Joseph Freeman*, *John Freeman* and *David Freeman*, to "them and their heirs forever, in full of their part of my estate." He also gave a negro to his grand-daughter *Anne Freeman*, "to her, her heirs and assigns forever," with a similar declaration, that it should be in full of her share of his estate, and after bequeathing a riding-chair and harness to his wife, "to her and her heirs forever,"

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he proceeded as follows: "It is my will and desire, that "all the remainder of my estate, of every nature and kind "whatsoever, shall be sold, and nine months credit given "to the purchasers; the money arising therefrom to go to "pay my just debts and funeral charges, and if there should "be any remainder, for it to be equally divided be- "tween my two sons, *Francis Speight* and *Henry Speight*, "to them and their heirs forever:" and appointed his sons, *Francis* and *Henry*, executors, who proved the will, paid all the debts of the testator, and both died intestate, before *Anne Speight*, the wife of the testator: that *James Gatling* took out letters of administration upon the estate of *Henry Speight*—and upon the death of *Anne*, the widow, received the property given her for life by the will of her husband, consisting of the original stock of negroes, together with a large increase: that *William Goodman* administered upon the estate of *Francis Speight*, and died before *Anne Speight*—and that administration *de bonis non* upon the estate of *Francis*, issued to *Henry Speight*, the younger: that *James Gatling* died in 1823, and that the defendants had administered on his estate. The bill then set forth the title of the plaintiff, as administrator *de bonis non* of *Henry Speight*, the elder, and concluded with a prayer for an account of the profits of the slaves, which the defendant's intestate received after the death of *Anne Speight*, and that the plaintiff's share of them might be delivered to him. *Henry Speight*, administrator *de bonis non* of *Francis Speight*, was made defendant, and upon his death, the cause was revived against *Thomas Sanders*, who was also appointed administrator *de bonis non* of *Francis Speight*.

The defendants, in their answer, admitted the principal allegations of the plaintiff. They stated, that their intestate not only administered upon the estate of *Henry Speight*, the elder, but that he also took out letters of administration *de bonis non, et cum testamento annexo* of the testator, *Joseph Speight*, under which he had, by the advice of counsel, and with the consent and approbation of the plaintiff, distributed the property given to *Anne*, the widow, for life, "among the distributees of *Joseph*, the testator."

This division was made in 1819, under an order of the County Court, and the report of the commissioners was filed with the answer, from which it appeared that they had divided the negroes left by *Joseph Spright*, to his wife for life, equally between all his grandchildren, *per stirpes*, excluding the *Freemans*, who he had declared should receive no further part of his estate. The several acknowledgments of the receipt of their shares, signed by the persons, among whom this property was divided, were also filed with the answer. By consent, the clerk was directed to take an account of the value of the negroes, and of their annual profits.

In his report, the clerk stated, that no evidence had been filed with him as to the value of the slaves, or the amount of profits received from their labour. He therefore had been governed by the valuation made by the commissioners, who divided them in 1819, and had allowed nothing for the profits of their labour, but charged the defendants with interest upon that valuation, and that he had rejected a claim made by the defendants for an allowance, on account of one of the negroes, who died in 1820.

Hogg, for the plaintiff, contended, 1st, that by the residuary clause, the property in dispute was given to *Henry* and *Francis*. (*Roper on Legacies* 488 *Cambridge* v. *Rous* 8 *Vesey* 14 *Blackledge* v. *Singleton* 3 *Murp.* 597).

2d. That even if the plaintiff agreed to the division as made, it should be corrected, on account of his ignorance of his rights.

Gaston, *contra*, urged, that the property did not pass under the residuary clause; and if it did, that the mistake committed in the division was a mutual mistake of law, and could not be rectified. (*James* v. *Avis* 4 *T. R.* 605. 4 *Bac. Ab.* 351 *Davers* v. *Dewes* 3 *P. Wms.* 40 *Att. Gen.* v. *Johnson* 2 *Rop. on Leg.* 457. *Amb.* 577).

HALL, Judge.—On the argument of this case, an objection was made, because *Francis Speight's* representative was not a party. But upon an inspection of the

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record it appears, that after the death of *Henry Speight*, administrator of *Francis Speight*, letters of administration *de bonis non* were granted to *Thomas Sanders*, and the suit has been revived against him.

The first question upon the merits of the case is, whether the property in dispute passed by the residuary clause of *Joseph Speight's* will, to *Francis* and *Henry Speight*. In the first clause the testator "lends unto my beloved wife *Ann Speight, during her natural life*: one half of the land and plantation whereon I now live, with one half of the improvements thereon; also five negroes, *Jenny, Henry, Stephen, Rose*, and *Pris*," with various other articles. In a subsequent clause he says, "I give and bequeath unto my beloved wife *Ann Speight* my riding chair and harness, *to her and her heirs forever*." It is observable, that in all the other clauses where the testator gives property, he uses the same words of limitation, "*to them* and their heirs forever." This is pretty satisfactory proof, that the negroes given to *Ann* were, like the land, given to her for life, and so far the remainder in them is undisposed of. The testator in a subsequent clause gives to his grandson *Joseph Freeman* twelve shillings, in full of his part of the estate, to him and his heirs forever. He does the same to *John Freeman* and *David Freeman*. He also gives to his granddaughter *Ann Freeman* one negro named *Luke*, to her and her heirs forever, in full of her part of his estate. It is pretty clear, that the testator did not intend that these last legatees should have any interest in the remainder of the negroes, given to his wife *Ann* for life. Nor can it be supposed, that he intended, as to that property, to die intestate. But I am of opinion, that it passed to *Henry* and *Francis Speight* under the following residuary clause: "It is my will and desire, that all the remainder of my estate, of every nature and kind whatsoever, shall be sold, and nine months credit given to the purchasers; the money arising therefrom to go to pay all my just debts and funeral charges; and if there should be any remainder, for it to be equally divided between my two sons, *Francis Speight* and *Henry Speight*, to them and

their heirs forever." This clause is sufficiently comprehensive to embrace it.

It is argued, that it is incredible that he intended the remainder in those slaves should be sold to pay his debts. I answer, that whether he intended it or not, he certainly subjected that interest to the payment of his debts; and his executors (who were *Francis* and *Henry Speight*) might sell it if they pleased. And if they paid the debts, they need not sell any of it. It was given to them, subject to the payment of the debts, and until it was exhausted, no other legacy could be touched for that purpose. I therefore conclude, that the property in question devolved upon, and became vested in *Francis* and *Henry Speight*, by the residuary clause in the will of their father, *Joseph Speight*. But it is stated, and relied upon, that the division was made amongst the four children of the testator by consent. This allegation, I think, has not been established. No doubt *James Gatling* acted honestly in making the division, and that he made it under legal advice. And this might have been the means, in some measure, of silencing the claimants, who were probably ignorant of their rights. The testimony of *John Gatling* and *William Gatling* would seem to show, that the division was made by consent; but the testimony of *Lewis Eure* and *Hillory Willey*, who were the commissioners that made the division, clearly prove that some of the plaintiffs were dissatisfied with it; and if others were silent, it might be and probably was, that they were ignorant of their rights. I therefore cannot consider the division to be a bar to the plaintiff's rights under the will.

A division of slaves, honestly made by an executor, upon a wrong principle, may be set aside upon the bill of a legatee, who has submitted to the division in ignorance of his rights.

A report has been made in this case by the clerk, in which he values the negroes claimed by the plaintiff, as they were valued in the year 1819, when the division took place. He states, that no evidence was offered, either as to their present value, or as to their hire or annual value. As the plaintiff was entitled at the time the division took place, and as the negroes were thereby withdrawn from him, I see no objection to taking their *then* value.

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Another objection is, that part of the valuation was made upon a slave, that died shortly after the division. It is to be observed, that the slaves are not produced by the defendants in discharge of themselves. If they were, it would probably appear that their increase would balance that loss. Or if there was no increase, the hire or annual value of the negroes might exceed the interest, so far as to cover it. I therefore think, that the valuation of the slaves and property claimed by the plaintiff, which was made at the division, should be the basis of a decree against the defendants.

PER CURIAM.—DECREE ACCORDINGLY.

SAMPSON WILDER v. CHARLES W. MIXON *et al.*

Where a testator directed his estate to be kept together, until one of his five children married, or should arrive at, &c. and then the one marrying or arriving at, &c. to receive a share, and the residue to remain undivided for the other children, "leaving the manor plantation, at a valuation of $4000 for the youngest child that may be then living"—*it was held*, that the testator contemplated several divisions; that the manor plantation was to be taken by the child who was the youngest at the last division; and that in the division it was to be taken as land, and not as personalty.

This bill was originally filed in Bertie. The case made by it was, that *Miles Rayner* died in the year 1819, having executed his will, whereby, after providing for his wife, he devised as follows: "I give and bequeath "the whole of my estate to my five children, *Cynthia*, "*Mary Ann*, *Martha*, *John* and *William*, to be and re- "main as a joint estate, until one of them may marry, "or arrive at the age of twenty-five years, at which "time that one to take its full share, and the balance to "remain undivided for the other children, leaving the "manor plantation at a valuation of four thousand dol- "lars, for the youngest child that may be then living; "but in no case shall any one of my children that has

"received an equal share, have any part of the undi-
"vided residue, so long as there shall be a child that
"has not received an equal share." That *William*, one of the sons, died before the testator, and the others survived him; that *Cynthia* had married, and received her share from the executor; that at her marriage, of the surviving children, *Mary Ann*, *Martha* and *John*, the last was the youngest; that soon after he died; that *Mary Ann* had married the defendant, *Mixon*; and *Martha*, the younger of the two, had married *Augustus Holly*, also a defendant. That the plaintiff was the guardian of *Mary Ann* and *Martha*, and had their joint estate in his hands, and was willing to settle with their respective husbands; that *Mixon*, who had married the elder, contended that *Martha* was, in the division, to take the manor plantation at a valuation of $4000, and that this valuation should be taken into the estimate, in dividing the personal fund as well as the land; that the defendant, *Holly*, claimed one half of the personal estate; and insisted that upon the marriage of *Cynthia*, the manor plantation vested in *John*, and that *Martha* was not compelled to take it at $4000, but was entitled to one half of it, under the will of her father. The bill prayed, that *Mixon* and wife, and *Holly* and wife, might interplead, and the plaintiff be indemnified in his payment to them, by the decree of the court.

Hogg, for the plaintiff.

Gaston, for *Mixon* and wife.

Badger, for *Holly* and wife.

HENDERSON, Chief-Justice.—This case comes before us on a bill of interpleader, and depends on the construction of *Miles Rayner's* will. The first point is, are the words, "the youngest child then living," confined in their operation to the first division, or do they also apply to the other divisions contemplated by the testator? That he did contemplate other divisions, is evident, as he directs the residue of his property to be kept undivided; and also, that none of his children, who have received an equal share, shall have any part of the *undi-*

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vided residue, so long as there is a child, that has not received a share. I am of opinion, that the words "*then living*" go through, and operate upon each successive division, and finally vest the manor plantation in the one who is the youngest, at the time of the last division. Nothing personal governed the testator in giving the manor plantation to the youngest; as it was quite uncertain who would be the youngest, even when the first division was to be made. It must have arisen therefore, from a fitness, in his estimation, that the youngest child should have the manor lands; or it was better suited to the other provisions of the will; either of which motives may be said to be continuing, and operating until the last division. Besides, it was impossible, that the residue of his estate should be kept undivided for his other children, and yet the manor plantation be given, or set apart in severalty, to the youngest child at the time of the first division. And if the words "*then living*" do not apply to the first division, they must apply to the others, on to the last division. We therefore think, that the manor plantation vested in *Martha*, who was the youngest child at the marriage of *Mary Ann*, when she had a right to call for a division; and which would put an end to the joint possession. By the words of the will, each child took a vested interest in right, but not in severalty. Upon the death of *John*, his estate descended to his heirs; but as they are his sisters, it makes no difference in this case.

The next question is, shall the $4000, the testator's estimate of the value of the manor plantation, be considered in the division as land or money? And are the two funds, land and personal estate, to be kept separate and distinct in the division? We think, very clearly, that it is land, and should be thrown into the land division. There is nothing to make it personalty. The valuation of it, made by the testator, could not have that effect. It was only doing then, what the commissioners would have had to do, upon making partition. If therefore, there are lands, equal in value, and no more, they may be allotted to *Mary Ann*. If more, the surplus will

be equally divided between the sisters. If less, then the difference must be made up from the personal property.

The clerk of this court will take an account of the estate, both real and personal, of the defendants, *Mary Ann* and *Martha*, which was of the estate of their father, *Miles Rayner*, and was, or ought to have been, in the hands of the plaintiff, their guardian, at the time of the marriage of the defendants *Mixon* and *Mary Ann*; and state an account between him and each of his wards.

PER CURIAM.—DECREE ACCORDINGLY.

JOHN T. CLANTON v. JOHN BURGES.

A vendor may complete his will, pending a suit to rescind the contract for defect of title, at any time before the hearing.

This bill was filed in Halifax, and alleged, that in the year 1825, the defendant offered to sell the plaintiff a tract of land, to which he represented that he had a good title in fee: that the plaintiff confiding in these representations, purchased the land at the price of $1240: that the defendant executed to him a deed in fee, with a covenant for quiet enjoyment, and the plaintiff gave his bond to secure the purchase money; that, in truth, the defendant had not an estate in fee-simple in the land: that he claimed under one *William W. Alston* and *Mary* his wife, who, after their marriage, had conveyed the land of the wife to the defendant, by a deed, to which the wife had never been privately examined. It further charged, that the plaintiff was in possession, and could not sue at law upon his covenant, and that the defendant had obtained judgment on the bond given to secure the purchase money. The deeds from *Alston* and wife, and from the defendant to the plaintiff, were filed as exhibits. By the former, the land was conveyed to the defendant, in trust, to pay over the rents and profits to

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be equally divided between the sisters. If less, then the difference must be made up from the personal property.

The clerk of this court will take an account of the estate, both real and personal, of the defendants, *Mary Ann* and *Martha*, which was of the estate of their father, *Miles Rayner*, and was, or ought to have been, in the hands of the plaintiff, their guardian, at the time of the marriage of the defendants *Mixon* and *Mary Ann*; and state an account between him and each of his wards.

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Mrs. Alston, during her life, for her sole and separate use, with a remainder in fee, to the issue of the marriage. This title was recited in the deed from the defendant to the plaintiff. The prayer was for an injunction and general relief.

The defendant, in his answer, admitted the principal charges in the bill; but alleged that the plaintiff was fully apprized of the nature of the title, and denied that he had ever represented himself as having full power to convey. Pending this suit, the defendant obtained from *Alston* and wife, a deed conveying the land in fee-simple to the plaintiff, to which the wife had been privately examined, and it was filed in the cause for the use of the plaintiff.

Seawell and *Devereux*, for the plaintiffs, insisted:

1st. That equity would grant relief, on the ground of mistake or failure of consideration, although there were perfect *bona fides* between the parties, and cited *Edwards* v. *McLeay* (*Cooper's Eq. R.* 308) *Gordon* v. *Gordon* (3 *Swans.* 467) *Fish* v. *Klein* (2 *Mer.* 431).

2d. That a vendee was not bound to take a title incumbered by a previous voluntary conveyance. (*Smith* v. *Garland* 2 *Mer.* 123.)

3d. That the deed filed in the cause, for the use of the defendant, was not mentioned in the pleadings, and therefore could not be read.

Badger, for the defendant, urged, 1st, That relief for a mistake in law would not be granted; that the vendee takes his title at his peril, if he is under no mistake as to the facts. And cited *Abbot* v. *Allen* (2 *John. Ch. R.* 519) *Lyon* v. *Richmond* (*do.* 51) *Shotwell* v. *Murray*. (*do.* 516) *Bilbie* v. *Lumley* (2 *East* 469).

2d. Where a bill is filed on the ground of defect of title, the defendant has a right to make the title perfect, up to the very moment of the hearing.

RUFFIN, Judge.—The defects of the title complained of consist in the want of a privy examination of *Mrs. Alston* to the deed to *Burges*, so that it passed only the estate for life of her husband; and in the trust created by that deed,

in favor of *Mrs. Alston*, and to her separate use during her life, and after her death for her issue. Pending this suit, *Alston* and wife have duly executed a deed to the plaintiff himself in fee, which has been filed in the cause by the defendant, for the use of the plaintiff. The bill does not charge any fraud on the part of the defendant. It alleges, indeed, that the plaintiff discovered, since he took the deed from *Burges*, the two defects above mentioned. But it is not charged that *Burges* concealed those facts, or that he knew the effect of them, and did not communicate it to the plaintiff. On the contrary the plaintiff exhibits the deed to him; and upon the face of it, there is an express reference to the deed of trust from *Alston* and wife. It might well be taken then, that the plaintiff knew the state of the title. He would certainly be affected with notice, in respect of the *cestui que trust* in that deed. For knowledge and the means of knowledge are the same. And the same fact, which communicates knowledge for one purpose, must be considered as doing it for all others. The case cited at the bar of *Abbot* v. *Allen*, (2 *Johns. C. R.* 519) lays it down, that a purchaser, who has received a conveyance, and is in possession and not disturbed, will not be relieved on the mere ground of defect of title, where there was no fraud nor eviction, but must rely on his covenants. Much more must it be so, when the very defects of title alleged were known to the party, at the time he took his conveyance. The contrary would amount to this: that no obligatory contract can be made, unless the vendor's title is perfect; and that any defect, secret or notorious—so notorious as to affect the price agreed on—should put it in the vendee's power to rescind, after receiving a conveyance, with covenants against those defects. This would be annulling contracts fairly made, and subject the vendor to circumvention, because he himself acted honestly. But this cause does not demand a decision of this point; as those defects have been since cured.

It seems that a purchaser who has given a bond for the purchase money, and is in the undisturbed possession, will not be relieved against the bond on the ground of a defective title, there being no allegation of fraud in the sale.

It is undoubtedly the law of this court, that the vendor may complete his title pending the suit, and at any time before the hearing. He is allowed to make good his

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contract, and buy his peace. The last deed from *Alston* and wife is an effectual conveyance of the fee to the plaintiff. Its validity cannot be impaired by an acknowledgement of the *feme* of the deed to *Burges*; for such acknowledgment does not relate back, and only makes it her deed from the time of her privy examination. The only possible *hiatus* then in the plaintiff's title is the trust in favor of the children, arising out of the estate of the husband as tenant by the curtesy, from the death of their mother until that of their father, if he should happen to be the survivor. Whether if the contract rested in articles, the purchaser would be compelled upon a bill of the vendor to accept a conveyance, with even this small cloud over it, I will not say. Probably he would not. He would have a right, before he parted from his money, to ask a clear title. But so minute an outstanding interest, depending upon such a contingency, can never form ground for rescinding a contract, at the instance of a purchaser who is in possession under a conveyance executed, with full covenants for quiet possession, from a vendor not alleged to be in failing circumstances, who made, on the treaty, a full communication of his title. To grant the prayer of the bill would be to proclaim encouragement to dishonest dealing, and an invitation to purchasers to expose latent defects in their vendor's title, instead of curing them by enjoyment.

Per Ruffin, J. Where the land of the wife was conveyed by the husband to her separate use during life, remainder to the issue of the marriage—upon an executory contract by husband and wife for a sale, a specific performance will not be decreed.

But if the sale be executed, so minute an outstanding interest as the trust in favor of the children, depending upon the curtesy of the husband, will not vacate the contract.

In truth, however, even this trivial imperfection does not exist in the title. It is now complete. The deed of settlement from *Alston* to *Burges* was after marriage; and so voluntary, and void as against subsequent purchasers under statute 27th *Eliz.* Of this there can be no doubt, whether the purchaser have notice or not of the previous voluntary conveyance. It is established by an uninterrupted series of cases, from the passing of the statute until this time. And there can be as little doubt, that the plaintiff must be regarded as a purchaser from *Alston* and wife; for the price paid to *Burges* is a consideration extending, under the circumstances, to them. *Smith* v. *Garland* (2 *Mer.* 123) and *Pulvertoft* v. *Pulver-*

Where the vendee has taken his title, this court will not rescind the contract, because of a prior voluntary conveyance by the vendor, which is void against the vendee.

toft (18 *Ves.* 95) were cited for the plaintiff, to show that though a voluntary deed be void, yet a purchaser could not be compelled to specific performance, where the estate was incumbered with such a conveyance. That only means, that a man shall not be forced to take a lawsuit, upon the bill of the vendor. But where he has already taken the title, the fetters which he has put on himself cannot be loosed by the court, upon any such ground.

It has been objected that no notice can be taken of the deed now filed, because it is not within the pleadings. The title supplied pending the suit never is. It is to be sure the more regular way, for one of the parties to ask a reference of the title, and have it reported. But that is only for the ease of the court; which may act by itself, and is not obliged to ascertain any fact by way of inquiry, but may do so directly. There is no complexity in this title; and therefore the court has thought it proper to proceed, without putting the parties to the expense and delay of an inquiry.

PER CURIAM.—BILL DISMISSED.

WILLIAM M. DAMERON *and* JOSEPH GOLD *et al.*

v.

MARY GOLD, *adm'x. of* JOHN DAMERON & JOHN CLAY, *et al.*

Upon a bill by children against the administrator of their father, charging that negroes had been advanced, upon the marriage, to their mother, and vested in her husband, and that after the death of their father, the negroes were claimed by the brothers and sisters of the mother, as having been a loan and not an advancement—there being no collusion between the administrator and the plaintiffs, and the former being in possession, and honestly defending his legal title—*it was held*, that the court had jurisdiction to decree a distribution of the slaves by the administrator, but not to try the controversy between the latter and those claiming a legal title adversely to him.

The bill was filed in Caswell, in 1824, by the children of *John Dameron*, and of *William Gold*, who were the first and second husbands of the defendant,

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Mary Gold. It charged, that upon the death of *Dameron*, the defendant, *Mary*, administered upon his estate; and that upon the subsequent death of *Gold*, *Richard Atkinson*, who was since dead, administered on his estate; that *Mary Gold* had a number of slaves, or their increase, in her possession, which her father, *Edward Clay*, put, by way of advancement, into the possession of *Dameron* about the year 1800, upon his marriage. That the slaves were given to *Dameron*, and had ever since been held by him, or by his administratrix. The bill further charged, that *Edward Clay* died in 1819, leaving a number of children, besides *Mary Gold*; all of whom, and his executor, were made defendants. It was alleged, that no division of those negroes had ever been made between the widow and children of *Dameron*; but that lately, the defendants, *Mary* and her brothers and sisters, denying the gift to *Dameron*, asserted a title in themselves, as derived by a subsequent gift from the father, *Edward Clay*, to them, in exclusion of the plaintiffs; and were about effecting a division among themselves, by petition filed in the County Court, against *Mary Gold*, for that purpose.

The prayer was, for an injunction against further proceedings towards a division amongst the defendants; that they might be compelled to set out their title, in order to have it litigated and determined in this cause; and that the slaves might be declared a part of *Dameron's* estate, and be distributed accordingly amongst the plaintiffs and the defendant *Mary*, with the other parts of the estate, of which a general account was sought.

The bill was taken *pro confesso*, against *Mary Gold*.

The executors and other children of *Clay* filed their answers, and denied the gift to *Dameron*, affirming that the negroes were expressly lent him by their father, who afterwards, and after the death of *Dameron* and *Gold*, disposed of them amongst all his children equally. They admitted, that the slaves were all in the possession of *Mary Gold*, and averred, that she asserted a title to them, as administratrix of *Dameron*, by virtue of the gift to him; and that to enforce a di-

vision of those and other negroes, given by their father to all his children, they had instituted the suit in the County Court by petition.

The cause was heard upon the proofs, at June term, 1830, when many depositions were read, which rendered it very doubtful whether there was, in fact, a gift or a loan to *Dameron*. Under these circumstances, an issue upon that question was directed.

This issue was tried on the last circuit, at Caswell, before SWAIN, Judge. His Honor instructed the jury, that where a father, immediately upon the marriage of his daughter, or shortly thereafter, sent home with her a slave, who continued in the possession of her husband for a great length of time, the law, before the passage of the act of 1806 (*Rev. c.* 701) inferred, that a gift or advancement to the child was intended by the father—and that the burthen of proving there was no gift or advancement, was upon the party who denied it. The jury found, that the slaves were put into the possession of *John* and *Mary Dameron*, as an advancement or gift, and not as a loan.

Before the act of 1806 (*Rev. c.* 701,) if a father upon the marriage of a child, put negroes into his possession, *prima facie* it is a gift, and not a loan.

Upon the return of this verdict, *Nash*, for the defendants, the children of *Clay*, moved for a new trial; and *Gaston*, for the plaintiffs, moved for further directions. These motions were submitted without argument.

RUFFIN, Judge, after stating the case as above, proceeded as follows: This court finds no reason to be dissatisfied with the mode of conducting the trial, or the opinions held by the judge of the Superior Court. They seem to be correct, and conformable to the settled law. But supposing the verdict to stand, whether all of the plaintiffs, or which of them are entitled to a decree, or whether any decree can be made against any of the defendants, except *Mary Gold*, are questions of more consequence, and remain to be disposed of.

The children of a second husband cannot enforce distribution from the administrator of the first.

The children of *Gold* have no right or direct interest in this property, as the estate of *Dameron*. It is a question, whether the distributive share of their mother vested in their father upon the intermarriage, or survived to

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her, upon his death, before an account of *Dameron's* estate had been taken, and distribution made. The court does not mean to determine that question; and indeed could not do it, since *Gold's* administrator is not before the court. If, however, it did survive to the mother, those plaintiffs have no interest whatever in the fund. If it vested in the father, it came to his administrator; who alone can call for the estate; for there may be debts. When an administrator *de bonis non* shall be appointed, and gets the property, there will be a trust for the children and widow, after creditors are satisfied. Under either aspect, the children of *Gold* cannot maintain this suit. And the bill must, therefore, as to them, be dismissed with costs, except as to the defendant, *Mary*.

Because, if the share of the wife vested in her second husband, his administrator only can claim it; and if it survives to her, the children have no right to it.

The children of *Dameron* can sustain this bill, as against the administratrix of their father, for an account and distribution. And as to the negroes in question, they are certainly, as between these parties, to be considered as those of *Dameron*. To that purpose, the verdict was not necessary. *Mrs. Gold* had confessed the right of the plaintiffs before. Indeed, I must suppose, from the proofs, and the whole course of the proceedings, that she never contested it, and was made a defendant, not to try the right against herself, so much as to bring a case into court, in which the right might be tried against the other defendants.

A court of equity has a clear jurisdiction on the bill of the *cestui que trust* against the trustee.

But whether the right, as against those other defendants, can be tried in this manner, is a very different and material question, and comes now to be considered. From their answer, which is supported by direct and divers proofs, it is clear, that before, and at the bringing of this suit, the defendant, *Mary*, claimed the negroes for herself and her children, as the gift of her father to her husband *Dameron*, and was in the exclusive possession under that claim. Indeed, the bill itself charges, that the other defendants were then suing *Mary Gold*, to compel a division and delivery of them, and the answer of those defendants admits the fact. The case is, then, that of a trustee in possession, claiming to hold according to the trust; and a third party, out of possession

But where a third person claims a legal title adversely to the trustee, a bill by the *cestui que trust* against the trustee and that third person, drawing the question of title into litigation in equity, cannot be maintained.

claiming by a different and distinct title, and denying the right, at law, of the trustee. In such a case, the *cestui que trust*, has filed a bill against the trustee and the adverse claimants, to have the conflicting legal titles litigated and determined here. Can such a bill be supported?

It may be here remarked, that this question is not at all connected with, nor does any consequence from the former orders, tend to determine it. The issue was directed, because there seemed to be great doubt upon the question of fact, which might be found against the plaintiffs. If so found, it would be decisive against them. It is true, the court did not then consider the effect of a finding the other way, as has happened. But that finding leaves the equity and question of jurisdiction open for a decision, upon their proper principles. Supposing then the gift to be established, as far as a verdict on an issue out of chancery establishes any thing, the inquiry recurs, can this bill be sustained?

It cannot be sustained as a bill of interpleader, because the plaintiffs are not in possession.

The court *is* of opinion, that it cannot. It cannot be made a bill of interpleader, for which it seems to have been designed. That is for the relief of a debtor, or of one in possession, who owes a duty to, or is trustee for one of two, and does not know which. If either of these parties could have brought such a bill, it would be *Mrs. Gold*, herself, against all the others; because she has the possession, and there are two claims. I should doubt, indeed, whether a trustee in possession, as such, could call the *cestui que trust* and a stranger into litigation, the latter not claiming by assignment from the former, nor any privity shown between them (*Dungey v. Angove*, 2 *Ves. j'r.* 312). But a person in possession under a legal title, cannot sue a person out of possession, upon the ground of a pretended distinct title, and to have it declared invalid, unless there be a fraud imputed to it, or some other matter peculiarly within this jurisdiction. It certainly cannot be done upon the mere ground, that the pretended title is bad, and his own preferable, as being prior or paramount. Those are pure questions of law, and the party in possession may well be content

And *it seems*, that the trustee cannot to protect himself draw the *cestui que trust* and a stranger into litigation.

Nor can one in possession, under a legal title, sue one out of possession, to have a pretended title of the latter declared void, unless upon some peculiar ground of equity jurisdiction.

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with the advantage that gives him. If this were not so, there never would have been such things as bills of discovery, or to perpetuate testimony, or to examine witnesses *de bene esse*. The matter would have been drawn at once into this court, to try the right and get relief, as attempted here, instead of getting aid to try in the proper legal forum. But it is said, the plaintiffs are *cestuis que trust*, endeavouring to enforce the trust; and that creates the jurisdiction. By no means. It does against the trustee. But as to third persons, the possession of the trustee is that of the *cestui que trust*. If the legal estate, out of which the trust arise, becomes extinguished, the trust goes with it. While the former continues, the latter does also. To protect that estate, and to defend the legal title, is one of the objects of creating trusts. And the *cestui que trust* must rely on the trustee's doing his duty, or in default of it, seek the appropriate remedy against the trustee in equity. Upon a suit at law against the trustee, or an adverse claim of the legal estate, the *cestui que trust* cannot, by bringing both the parties here, change the jurisdiction. If so, every estate once put into trust, or that got into executors' hands, would be made to cease being a subject of legal litigation. If the trustee transfer the legal title, he is responsible in his own person and estate. If the transfer be accepted with notice of the trust, that is a fraud, and the estate remains subject to the trust. If the trustee remain in possession, and is sued by a stranger, if he collude, or even be insolvent and negligent, equity will permit the *cestui que trust* to use the trustee's name in defending at law, and coerce the trustee to lend his assistance. But in all those cases, the jurisdiction is not changed, as to the adverse claimant; but the legal title is still tried by the appropriate tribunal. If indeed a recovery had been permitted by collusion, and the possession changed, it stands on the footing of a conveyance in fraud, and with notice, and is within the cognizance of this court. But here the possession remains with the trustee: the title is firmly asserted by the trustee; and the defence honestly and

faithfully made by the trustee. The bill, it is true, charges collusion. But it is not the allegation, but the fact that enables equity to give relief; and the fact is clearly proved the other way. If the petition in the County Court were not a harmless thing—if an adverse possession, under an adverse title, could be disturbed by a decree in it, supposing a court could be got to make such a decree, (even if partition of personal chattels could at all be effected in that way,) yet there is no truth in the charge, that *Mary Gold* assented thereto, and intended, collusively, to betray the interests of her children, with the care of which she stands charged. What would be the effect of this proceeding? By making all the defendants, by allegation, a unit in the claim against the plaintiffs, the declarations of the defendant, *Mary*, might be made to destroy the rights of the other defendants, altho' they claim, in point of fact, in opposition to each other.

Such a feigned allegation of collusion will not authorize the *cestui que trust* to make a stranger a party to his bill, to enforce the trust, or distribute the trust fund in possession of the trustee. All that he can ask is to get the property, so that he can defend it himself. If the trustee wants an indemnity against the adverse claimants, it is time enough to consider whether any shall be decreed, and the extent of it, when asked for by the trustee. The *cestui que trust* cannot say to a stranger, you shall try your legal title with me in equity, and not at law with my trustee in possession. There is no such jurisdiction. The verdict must therefore, upon this ground, be set aside, as to all the defendants, except *Mary Gold*, each party paying their own costs of the trial at law; and as to the same defendants, the bill must be dismissed with costs in this court.

As between the plaintiffs, who are the children of the intestate, *Dameron* and the defendant *Mary*, the slaves in question are declared to be a part of the estate of the said intestate, and an account ordered, if the plaintiffs should think proper to risk it, and bring on the case again, without making the administrator of the intestate, *Gold*, a party. PER CURIAM.—DECREE ACCORDINGLY.

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JOHN PIKE *et al.* v. STARK ARMISTEAD *et al.*

Where a decree pronounced in the Superior Court does not ascertain any fact, nor declare any principle upon which it was founded, but simply dismisses the bill, on appeal, the decree is not of course reversed, but the cause will be reheard upon the proofs.

This cause was heard at Washington, on the spring circuit of 1830, before MANGUM, Judge, when the following decree was pronounced by his Honor:

"This cause coming on to be heard on the bill, answer, proofs and exhibits, it is ordered and decreed, "that the bill be dismissed with costs." From which the plaintiffs appealed.

At June term, 1830, upon the opening of the cause, *Badger*, for the plaintiffs, objected, that under the act of 1818 (*Rev.* c. 962) in cases of appeals to the Supreme Court "such judgment, sentence or decree," may be rendered by the court, "as on an inspection of "the whole record, it shall appear to them ought in law "to be rendered thereon." He insisted, that under this act, the court could only look at the record, and not at the proofs taken below, and certified with it; and as the decree neither ascertained any fact, nor stated any principle upon which it was founded, it must be reversed.

On his motion to reverse the decree below, this question was elaborately discussed by him, and by *Gaston* and *Hogg*, for the defendants.

RUFFIN, Judge.—A preliminary point has been raised, which, if decided in favor of the plaintiff, must reverse the decree, without entering into the merits. The decree finds no fact, nor declares any principle on which it is founded. It professes to be made on a hearing on the bill, answers, proofs and exhibits; and orders the bill to be dismissed. It is said, there is nothing appearing to this court, on which that decree was founded; nor any thing on which a decree in affirmance can be given; and so the decree must *ex necessitate* be reversed.

Generally, the material matters in issue are stated in the decree; and the determination of the court on them.

This is requisite to enable the party to point to the error, on which he brings his bill of review. And if this were a proceeding of that sort, the decree could not stand; because there the evidence is not seen by the revising court, but only the pleadings and the decision. But it is otherwise in England, on an *appeal* in equity; for that is only a rehearing by a higher court, instead of being on a petition to rehear by the court which gave the decree. This is the known rule in chancery. But it is contended, that we cannot look into the evidence, because this is a court of limited jurisdiction, and because before the act of 1818, the Supreme Court could only respond to such questions of law, as were stated, and sent from the circuit. This court, it is true, has a limited jurisdiction; that is, it has no original jurisdiction. But where it has an appellate jurisdiction, not only to review and reverse decisions below, but also after reversing, to proceed to give such a decree as in law and justice ought to have been given by the court below, the purposes of justice would seem to require, that all the means of ascertaining the merits should be possessed by us, that were by the tribunal which first acted. At law, it is so. For the judgment rendered does not rest upon the evidence given, but upon the facts found by the jury. In equity, the judge finds the facts, as well as the rule of decision. And as it is impossible often to separate the principle from the facts, as in cases of hardship, fraud, notice, and the like, it would be almost impossible, that the judge below, or those here, could state, with sufficient minuteness, every circumstance on which the principle of equity arose. This difficulty was experienced by the Supreme Court of the United States, under the Judiciary Act sec. 19, which requires *the facts to be stated* by the parties or the judge, on writs of error in admiralty or equity causes. In *Hills* v. *Ross* (3 *Dall.* 184) it was decided, that the Supreme Court must take those *facts* thus stated, and could not look into the *evidence*. But this restriction was admitted by the court, not on the idea that theirs was a limited jurisdiction, but be-

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cause it was imposed by the express words of the statute; and even then, its extreme inconvenience, and the injustice it might produce, pressed so hard, as to produce a division of opinion. This mischief was remedied by the act of 1803; which repeals that clause, and thus left the court free to exercise the ordinary jurisdiction of rehearing. Our act of 1777, (*Rev. c.* 115), allowing appeals on petitions, directs a rehearing; which shews the sense of the legislature of what is the proper effect of an appeal in equity. But it is said, that the act of 1818 only transfers to this court the jurisdiction of the previous court. It likewise gives the power, and enjoins on the court, to make such decree as on the whole record, ought to be made: which involves the duty of considering every thing which the judge below had before him. For we are to determine what he ought to have done, and *then to do it here.* In equity causes, that duty cannot be performed, without hearing all the proof he heard. To this it is objected, that the act could not mean that, because at that time the court below could not pass upon the facts. True; but upon appeals under the act of 1810, were the facts stated in the decree, and was the Supreme Court to take them to be true as there stated? No. For as the judge could not find them, the evidence of the facts was the finding of the jury. The Supreme Court had then the same evidence which was before the Superior Court—namely, the verdict; and if the record did not contain that evidence, the decree must be reversed, as being without evidence. (*Taylor* v. *Pannill.*)

When the power to pass on the facts was conferred by a subsequent law on the court, that power and duty is imparted to this court. Since, then, there is no express restriction in our statute, as there was in the act of Congress, and since it is in the nature of chancery proceedings, that upon appeal there shall be a rehearing, and the useful execution of the duties imposed on this court requires it, I must conclude that the *whole case* is before us. The question is certainly not without doubt, and has been much considered by the court. There is an inconvenience in the expense of a transcript; which was

not seen in 1818, because then only the issues and the verdict were sent here. But that may be remedied by a legislative direction to send the originals; and at any rate, ought not to impose on us the necessity of taking the facts, *with all their colouring*, from a single judge's hasty opinion on the circuit. The decree will therefore not be reversed on this ground; but the cause will be heard on its merits, as appearing on the proofs.

PER CURIAM —MOTION OVERRULED.

HENRY BIZZELL v. WILLIAM SMITH.

If a creditor be bound to sue the principal at the request of a surety, his refusal does not discharge the surety, if no injury results to the latter—as where the principal debtor was insolvent when the liability of the surety was incurred.

This bill was filed in Wayne, and alleged that the plaintiff in 1820, became surety for one *John McKinnie*, in a bond to one *Fellow*; that the bond was assigned by *Fellow* to one *William Bizzell*—that when the bond was executed, *McKinnie* was solvent; but that the plaintiff being anxious to be relieved from his responsibility, applied to the holder either to commence suit on the bond, or procure *McKinnie* to renew it with another surety—that *Bizzell* promised to do so, and in case of failure, that he never would call upon the plaintiff to pay it—that *William Bizzell* died, and administration on his estate had been committed to the defendant; that the bond was found among the papers of the intestate, and *McKinnie* having become insolvent, and removed out of the state, suit was commenced against the plaintiff alone. The prayer was for an injunction.

A statement of the answer and proofs is unnecessary.

W. C. Stanly, for the plaintiff. Where the surety calls upon the obligee to enforce the collection of his debt, and the obligee refuses, it is a discharge of the surety.—(*Pain* v. *Packard* 13 *Johns.* 174 *King* v *Baldwin* 17 *do.* 384 *Fulton* v. *Matthews* 15 *do.* 433).

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It seems, that the creditor is not bound to sue the principal debtor at the request of the surety.

J. H. Bryan, contra, was stopped by the court.

RUFFIN, Judge.—The principle assumed in the bill is, that the delay or refusal of the creditor to sue the principal debtor, after request of the surety, discharges the latter. This position is more than questioned by the court. The very contract of the surety is, that the principal will pay; and dispenses with active diligence on the part of the creditor, who ought not to be bound to incur the expense and trouble of litigation, for the relief of the surety: since the latter, by performing the contract on his part, namely, by payment, may immediately have, in his own name, and under his own control, all the remedies which the law gave to the creditor himself. The question is nothing more than this: which of the two shall bear the burden of bringing and conducting a suit? And surely he, for whose benefit, and at whose instance it is instituted, cannot complain that the task is imposed on him—especially as he has undertaken with the creditor, to answer for the acts of the debtor.

But the court will leave that point undecided, since the plaintiff has not brought his case within his own principle, and the authorities from which it is drawn. For clearly, if the creditor be bound to bring an action on the request of the surety, the rights of the creditor are not impaired, unless the party has received prejudice. There must be *laches* of the creditor, and consequent loss to the surety. And this loss ought to be clearly proved by the plaintiff. So far from this being done here, the proof in the cause is distinct, that *McKinnie* was insolvent at the time the bond was given—much more when the intestate was requested to bring suit.

PER CURIAM.—BILL DISMISSED.

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CHARLES WILSON v. TURNER D. WHITE *et al.*

Where executors having a power to sell lands, honestly made an arrangement with the widow of the testator to waive her right to dower, and sold with notice to the purchaser of the widow's claim —*held*, that the latter was entitled to no relief, upon the widow's interposing her claim.

The plaintiff alleged, that *Thomas White* died seised of a tract of land in Virginia, on which he resided; that he appointed the defendants executors of his will, and directed them to allot fifty acres of land to his widow, in lieu of dower; that these fifty acres did not include the dwelling-house and outhouses, and was of less value than the dower in the whole tract would have been; that, under a power in the will, the executors advertised the residue of the land for sale; but understanding that the widow intended to claim her dower, they had agreed to give her a horse and one year's provisions, and build her a house, upon condition of her abiding by the will; that upon her acceding to these terms, the land was exposed to public sale, subject to the life-estate of the widow in fifty acres only, and was bought by the plaintiff; that the widow, alleging that the defendants had not complied with their agreement, had recently sued out process for the assignment of her dower. The bill concluded with an averment, that by the laws of Virginia, the widow was entitled to dower, and prayed for an injunction against a judgment on the bond, given by the plaintiff to secure the purchase money.

The defendants denied all the equity of the bill, averring, that they had made no promise to the widow, to induce her not to dissent from the will—that she voluntarily avowed her determination to abide by it, and that all the defendants had done for her, proceeded from motives of benevolence; and they alleged that the widow had been instigated by the plaintiff to dissent from the will, solely for the purpose of giving him some foundation for this suit. They also alleged, that the widow was present when the plaintiff purchased, and did not

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make known her claim; and upon this ground insisted, that the plaintiff was protected in equity against her dower. Testimony was taken which established the fact of the widow's consent to the sale, and of some disagreement between her and the defendants, as to the latter not complying with the previous stipulations—but there was no proof of a stipulation by the defendants, that the widow should not claim dower.

His Honor Judge Swain, at Caswell, on the last circuit, dissolved the injunction which had been granted, and dismissed the bill, and the plaintiff appealed.

No counsel appeared for either party in this court.

Henderson, Chief-Justice.—Giving to the testimony its greatest weight, it proves only that the widow agreed to forego her right to dower, and take the fifty acres of land devised to her in her husband's will, in consideration of certain promises made to her by the executors, in regard to building her a house on the fifty acres, giving her a horse, some stock and some family supplies; and that they have not fully performed their promises; and that *in making* these promises and *in failing* to fulfil them, *no fraud was intended* on the purchaser of the land, or any other person. I think that such a case affords no ground of relief to the purchaser. No assurance was given that the land was free from the widow's claim of dower. It was known however that there was a widow, for she was present at the sale; and knowledge that there was a widow, was knowledge of her rights. The plaintiff was therefore a purchaser with full notice. If indeed it had been proclaimed, in order to enhance the price, that the widow had consented to forego her claim to dower, then as those promises were the cause of such consent, they ought to have fulfilled them. But it appears, that nothing was said about the widow's dower. The defendants sold, and the plaintiff bought, subject to that claim; and there being no fraud, there is no ground to rescind the contract.

Per Curiam.—Decree affirmed.

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JAMES S. BATTLE v. SPENCER L. HART *et al.*

Upon the insolvency of the principal debtor, a surety is considered in equity as a creditor, and may retain, against an assignee for value and without notice, any funds of the principal which he has in his hands.

The bill was filed in Edgecomb. The facts charged and admitted, were, that one *Joseph Bell* and *Robert Joyner*, copartners in trade, becoming insolvent, by two deeds, made a general assignment of their effects to a trustee, in trust, to secure their endorsers, among whom was one *Barnes*. That the plaintiff was a large creditor of *Bell & Joyner*, and entirely without security, and by an arrangement between them, *Bell & Joyner* conveyed all their estate, already assigned as above, to *Spencer D. Cotton*, in trust, to secure the plaintiff, who gave bond and surety to discharge all the debts, secured in the two deeds made before that time—that the plaintiff got possession of the two deeds, and thinking he had a right to do so, refused to permit them to be registered. That a sale took place under the deed to *Cotton*, of all *Bell & Joyner's* effects, at which *Barnes* purchased to a large amount, but refused to pay the sum bid by him, upon the ground that he had a right to retain, until the debts to which he was surety for *Bell & Joyner* were paid; and that it was then agreed between *Barnes* and *Cotton*, that he should retain the property purchased by him, but the title thereof was not to be changed, and it should remain subject to the claim of the plaintiff. *Barnes* paid the debts for which he was the surety of *Bell & Joyner*, and afterwards made a general assignment of his property to the defendants, for the purpose of securing his endorsers, among whom was the plaintiff, and to an amount much larger than the sum which *Barnes* owed *Cotton*, the trustee, for purchases at the sale of *Bell* and *Joyner's* effects—and among the property thus conveyed, were the specific articles bought by *Barnes* at that sale. Upon the property assigned by *Barnes* to the defendants being exposed to sale, *Cotton*, the plaintiff's trustee, interposed a claim on his behalf to the articles bought by

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Barnes at the former sale; and it was then agreed between the defendants and *Cotton*, that the sale should proceed, the defendants binding themselves to hold the avails of it subject to the claims of the plaintiff.

Barnes was insolvent at the time the plaintiff made the arrangement with *Bell & Joyner*, and at that time the plaintiff was also his surety to a large amount.

The bill prayed that the sum which the defendants received from the sale of the property, bought of *Cotton* by *Barnes*, might be paid in exoneration of the plaintiff from his liabilities for the latter. *Barnes* was made a defendant.

The case was submitted without argument, by *Badger*, for the plaintiffs, and *Devereux*, for the defendants.

RUFFIN, Judge.—The state of this case is shortly this: the trustees in the deed made by *Bell* and *Joyner* for the benefit of the plaintiff, made a sale, at which *Barnes* purchased. He declined paying, upon the ground, that the plaintiff knew of the previous unregistered deeds of trust, in which *Bell* and *Joyner* had provided an indemnity for *Barnes* against the suretyships in which he was involved for them. The bill admits this equity of *Barnes*; for altho' he had not then paid the debts, yet he was liable for them, and the principals were insolvent. But the bill sets up an equity of the same nature, and founded on precisely a similar state of facts, against *Barnes* himself. The bill alleges, and the answer also admits, that at that time *Barnes* was also insolvent, and the plaintiff was surety for him. Upon the direct authority of *Williams* v. *Helme*, (*ante* 1 *vol.* 151,) founded on the clearest principles, the plaintiff had, then the right of getting any funds he could of *Barnes*, and retaining them for his indemnity; and he may thus retain against an assignee in equity for value, and without notice. A surety in such a situation is a creditor; and the subsequent assignee only succeeds to his assignor's rights, and subject to the equity of the surety, which is prior. If indeed the contest was between the original creditors of *Bell* and *Joyner*, to whom *Barnes* was liable

as surety, that might make a difference. Had they not been paid by *Barnes*, they might have asked for the fund created for their satisfaction, both against the plaintiff and *Barnes*. But they are satisfied, and out of the way. The question is, whether *Barnes*, who was bound to pay to *Cotton*, the trustee, for the effects purchased at the sale, and who did not, under an agreement that the title should remain unchanged, and subject to all the demands of the plaintiff, can claim that property or the price of it for himself—not for the creditors of *Bell* and *Joyner*—as against a man who was then his surety for his debts to a larger amount, and afterwards was obliged to pay them. The equity of the plaintiff against *Barnes* is palpable, and must be felt by every body upon the stating of it. An assignment of the property to the defendants confers on them no better claim. They did not get the legal title thereby; for it is proved by the deposition of *Cotton*, read by consent, that the title was reserved in him by express agreement between him, *James S. Battle* and *Barnes*, founded on the very claim now set up by the plaintiff.

The present defendants admit they disposed of the effects at *Barnes'* sale, under another agreement that the proceeds should be subject in their hands to the claim which the plaintiff or his trustee, *Cotton*, had to the specific effects; and that they yielded the sum of $1163 62. This sum belongs to the plaintiff upon the principles assumed by the court: if in point of fact the demand against *Barnes*, arising out of the debts paid for him, shall amount to as much, after deducting what may be in the hands of *Cotton*, or the plaintiff, (if there be any thing) arising from *Bell* and *Joyner's* sales, applicable to the satisfaction of the debts which *Barnes* or his assignees have paid. The bill indeed charges very large demands of the plaintiff on *Barnes*, after all those allowances; and the answer admits that a balance is due, on the whole, from *Barnes*, but does not confess a particular sum. This makes it necessary to have an inquiry; if the parties cannot themselves agree, after this declaration of the principle by the court.

PER CURIAM.—DECREE ACCORDINGLY.

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Whitmel H. Pugh v. William Brittain.

Where a deed describes the land conveyed by metes and bounds, and by mutual mistake of the parties, covers land which the vendor did not intend to sell, nor the vendee to buy, the mistake will be corrected.

This bill was originally filed in Bertie, and alleged that the plaintiff and his brother *Augustine Pugh*, being possessed of a term for years in a tract of land called the Briery Pocoson, contracted to sell it to *William W. Johnston* for $2400. That before the purchase money was paid, *Johnston* died, having appointed the defendant his executor—that at the sale of *Johnston's* effects, the plaintiff mentioned to the defendant the contract of sale, and the amount due him by *Johnston*, who induced him to purchase to the amount of the debt, upon an agreement that the debt due the plaintiff should be set off against the amount of the plaintiff's purchases—that the plaintiff and his brother, in pursuance of this agreement, offered to assign the term to the defendant, for the use of the next of kin of his testator—but the defendant expressing some doubts as to the solvency of *Johnston's* personal estate, proposed that the term should be sold by him, as executor, at public sale, as if it belonged to the estate of his testator, and that if it did not bring the sum of $2400, which he, the defendant, as executor of *Johnston*, had paid for it, the assignment should be made directly to him—and that he would stand responsible, as executor, for the purchase money. That the land was, according to this agreement, sold, without mentioning the boundaries, but as a term for years in the Briery Pocoson—that it did not sell for $2400, and thereupon, the plaintiff and his brother assigned it to the defendant, with covenants for quiet enjoyment. That in the deed of assignment, the land was described as containing six hundred and forty acres, and the boundaries thereof were set forth—but that it was the intention of the parties thereto, and of the testator, that the plaintiff and his brother should sell only that part of the

Briery Pocoson to which they had title—that by mistake, the boundaries set forth in the deed covered a tract of land to which the assignees had no title—that the land thus, by mistake, included within the description in the deed, at its execution, belonged to one *Malachi Chamberland*, who was since dead—that *Chamberland*, and those under whom he claimed, had been for forty years in possession—that at the sale of the term by the defendant, no idea was entertained of selling the land of *Chamberland*, neither did the defendant ever think that *Chamberland* owned any part of the land—that upon a survey, it turned out that the boundaries of the deed executed by the plaintiff and his brother, covered the land belonging to *Chamberland*, and that the defendant had, upon ascertaining this fact, commenced an action upon the covenant of quiet enjoyment contained in that deed. The bill averred, that the land really owned by the plaintiff and his brother, after deducting from it, as described by the boundaries, that part belonging to *Chamberland*, exceeded in quantity six hundred and forty acres, and prayed an injunction against the action of the defendant.

The defendant, in his answer, stated, that upon examining the will of the testator, he found the Briery Pocoson bequeathed by the testator to two of his sons; that from thence he inferred, either that the purchase money therefor had been secured or paid—that soon after probate of the will, he discovered that he had not assets to pay simple contract debts—he denied that he had persuaded the plaintiff to purchase at the sale of his testator's assets, but stated, that at the sale the plaintiff informed him, that the purchase money for the Briery Pocoson had not been paid, and asked him if he would set off his, the plaintiff's, bid for a quantity of corn, against the debt due upon that purchase—that supposing the plaintiff had a bond for the amount, he, without making due inquiry, incautiously consented. That upon coming to a settlement with the plaintiff, and finding that he had no note or bond for his debt, the defendant refused to comply until he had taken counsel—that after taking advice, being very anxious scrupulously to fulfil

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PUGH v. BRITTAIN.

his bargain, he agreed to allow the plaintiff the debt due him, but for his own indemnity sold the term, as the property of his testator, intending if it brought more than $2400, to give the benefit of the purchase to his testator's estate; and if not, to charge himself with the sum of $2400, and take the term on his own account. That at the sale thus proposed, nothing was bid for the land; and thereupon, the plaintiff and his brother conveyed to him, and thus the purchase was forced upon him against his will, and solely to enable him to comply with a hasty pledge given the plaintiff. That the Briery Pocoson was originally leased for a term of years by the Tuscarora Indians to *Thomas Pugh*, the grandfather of the plaintiff, and under whom he claimed, who conveyed one hundred acres thereof to one *Samuel Williams*, by whom it was assigned to *Samuel W. Johnston*, who conveyed to *Chamberland*—that the boundaries set forth in the deed of the plaintiff and his brother, were those described in the original lease to *Thomas Pugh*—that neither he, nor his testator, and as he believed, neither the plaintiff nor his brother, knew any thing of the fact that *Chamberland's* land was included within the boundaries by which the plaintiff and his brother conveyed, as the lands were low and subject to inundation, and no survey of them had ever been made. He admitted an eviction by one *Bartlett*, claiming under *Chamberland*, and the pendency of the action upon the covenant, and insisted, that as the plaintiff sold, and he bought, by the title papers alone, and that the conveyance to him intended to set forth the boundaries of the original lease, there was no mistake in the contract—but he got, and the defendant sold, exactly what was intended. And further, that if the contract was in any way altered, it should be rescinded, and submitted to re-convey to the plaintiff, and account for the rents and profits, upon receiving his purchase money, with interest.

Replication was taken to the answer at spring term, 1828, and a survey of the land was then ordered. At fall term, 1828, the cause was "set for hearing on the bill and answer," with leave to take testimony—and the

survey was then returned; from which it appeared, that within the boundaries of the plaintiff's deed to the defendant, there were, without including the land belonging to *Chamberland*, seven hundred and twenty-one acres. No depositions were filed.

The case was argued at length upon its peculiar circumstances. *Gaston*, for the plaintiff, cited *Hart* v. *Ten Eyck* (2 *Johns. C. R.* 62, 87).

Seawell & Hogg, for the defendant, cited *Jer. Eq. Jur.* 366. *Mortimer* v. *Capper* (1 *Bro. C. C.* 156) *Gordon* v. *Gordon* (3 *Swans.* 467) *Cooth* v. *Jackson* (6 *Ves.* 11, 25) *Leonard* v. *Leonard* (2 *Ball & B.* 171).

HALL, Judge.—A replication has been filed in this case to the defendant's answer; and the cause is put down for hearing upon the bill, answer and survey. The case can therefore be decided for the plaintiffs, only upon the facts which the defendant admits, as responsive to the allegations of the bill. It is therefore important, that those facts or admissions should be well understood.

His Honor then stated the substance of the answer as given above, and proceeded: It is therefore the opinion of the defendant, that the plaintiff conveyed land to him, which neither he nor his brother believed was included in the boundaries set forth in the deed, and which they both knew belonged to another person. The bill is filed to rectify the mistake.

But the defendant insists, that as the parties were ignorant of the lines, and had not the means of ascertaining them by a survey, the vendors meant to sell, and he to purchase all the lands described in the deed to the elder *Pugh*, grandfather of the plaintiffs—that he looked to the paper title only. If a person was purchasing another's interest in lands, in no respect located, there might be some ground for such a claim. But in this case, the parties had a knowledge of the land sold, but not of its particular boundaries; for the defendant describes it as low, flat land, uncleared and covered with water in the winter. And neither party ever dreamed, that *Chamberland's* land was part of it. For it seems

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that *Bartlett*, who claimed under *Chamberland*, was in actual possession of that land.

The defendant certainly got a title for less land than the boundaries of his deed cover. But deducting the *Chamberland* tract, the deed conveys more land than six hundred and forty acres, the quantity it calls for.

PER CURIAM.—INJUNCTION PERPETUATED.

Hyatt vs Myers 73 N.C. 232

THE ATTORNEY GENERAL *upon the relation of* GEORGE EASON v. JAMES PERKINS.

Where the owner of land adjoining an old mill site sought to enjoin the erection of a new mill, and it was ascertained by a verdict, that the mill, tho' injurious to the health of the plaintiff's family, was advantageous to the public, relief was refused; especially as the old mill was erected before the plaintiff purchased.

The cases of *Attorney General* v. *Hunter* (*ante* 1 *vol.* 12,) and *Attorney General* v. *Blount*, (4 *Hawks* 384,) approved by RUFFIN, Judge

The bill, originally filed in Pitt, alleged that one *Mooring* had formerly erected a dam, and built a mill near the house of the relator—that the mill-pond extended within eighty yards of the house—that while the mill was kept up, it rendered the adjoining country, and particularly the residence of the relator, unhealthy, insomuch as to be a nuisance, and that it was of no public convenience, and only worked during the wet season—that in the year 1820, it was much injured, and that *Mooring* finding it unprofitable, had permitted it to go to ruin. That from this period, there was an improvement in the health of the neighbourhood, and particularly in that of the relator's family—that *Mooring* having died, the site of the mill was purchased by the defendant, who had commenced rebuilding the dam. The prayer was for an injunction to restrain the defendant from rebuilding the mill and dam.

The defendant, in his answer, admitted the fact of *Mooring's* having formerly owned the mill, and his purchase of the land on which it was situated,

which he averred took place in the year 1828—he also admitted his intention of rebuilding the mill, having formed that resolution, in consequence of the earnest request of the neighbourhood. He alleged, that the old mill was in existence in the year 1795, when the relator purchased the land on which he lived—that it had continued in operation from that period until *Mooring* permitted it to go to ruin, without any complaint on the part of the relator. He insisted that *Mooring* had never abandoned the intention of rebuilding, but had actually prepared timbers for that purpose, and denied that the old mill-pond had, or that the new one would have, an injurious effect upon the health of the neighbourhood.

The points on which the parties were at issue, were submitted to a jury, who found that the proposed pond would overflow some land belonging to the relator; that the health of the relator, and of his family would be injured thereby, but not that of the neighbourhood; and that the erection of the proposed mill would be of public utility, and not a nuisance.

Gaston, for the plaintiff, cited *Gardner* v. *Newburgh* (2 *Johns. C. R* 162) *Newburgh T. C.* v. *Miller* (5 *Id.* 101).

The Attorney-General & Hogg, for the defendant, cited *Att. Gen.* v. *Cleaver* (18 *Ves.* 211). *Van Bergen* v. *Van Bergen* (3 *Johns. C. R.* 282) *Att. Gen.* v. *Nichols* (6. *Ves.* 336.) 3 *Kent's Com.* 358. *Com. Dig. Action on the case M. Nuisance G. Rex* v. *Cross* (12 *E. C. L.* 2216)

RUFFIN, Judge.—The arguments at the bar took a wide range, embracing a discussion of almost the whole jurisdiction of this court, under the head of nuisance. It is not intended to notice all the points of controversy; because the court is under no necessity of laying down any general principles for the decision of this case. It stands on very special circumstances, found upon issues requested by the parties.

It is admitted, that for the ordinary damage to the plaintiff's land by flooding it, there is a remedy by action; and that it is an adequate remedy. On that score then, the interposition of this court is not asked.

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But it is said, that the injury to the plaintiff's health and that of his family is one, which cannot be ascertained at law; much less, adequately compensated; and that a just apprehension of it forms a proper case for the preventive justice of equity, by injunction.

Where the right affected is clear, or the injury irreparable, injunctions are granted against private nuisances, originating in establishments for personal gratification or private profit only.

It may be so, where the nuisance, thus operating upon an individual, arises from an establishment made for personal gratification, or mere private profit. It is certain, that equity does, in some instances, restrain mere private nuisances. But it is equally certain that it is not forward to do so, unless they interfere with a clear right long previously enjoyed; or will be followed by irreparable mischief, which makes immediate action a duty founded on imperious necessity. These are general doctrines. And the destruction of health might well be considered a case of irreparable mischief, in a case where private emolument alone is looked to on the other side. But our views cannot be thus limited in the case before us. Mills are necessary public conveniences; and water mills the ordinary and almost the universal kind in this state. It is a maxim, that private right must yield to public convenience, upon adequate compensation. Without adverting to the variety of subjects to which courts have applied it, it is sufficient for the occasion to remark, that the legislature hath by divers statutes extended it to mills. In a modern act, it has been carried to the unusual extent of taking away the common law action, until the *quantum* of damage has been ascertained, by a peculiar method, to be more than £10 annually. If less, it amounts to a compulsory lease for five years. It may be, that the damages of the plaintiff will be less than the sum specified in the act. It would be strange, if this court were to prohibit the erection of a mill, for which, if erected, the party, by positive enactment of the legislature, can have no action at common law. If the plaintiff rely on the magnitude of the injury, he ought to have put it to the jury to assess the probable amount, or at least to have made proof, to rebut an inference fairly deducible from the verdict. The jury have found, that the mill will be a convenience to the neighborhood,

But private right must, upon adequate compensation, yield to public convenience; & courts of equity will not interfere by injunction, where the public benefits resulting from such an establishment exceed the private inconvenience.

and of public utility: and that the health of the neighborhood will not be injured, but that of the plaintiff's family will—tho' to what extent or what probable extent, it is not said. The argument is, that this is sufficient; for it is impossible for a jury to say, which fever is caused by the pond, or by the general insalubrity of the climate; and that though the lower part of the state be unwholesome, yet the pestilence ought not to be aggravated by artificial causes. True; that is, from wantonness or for mere gain's sake; which would be wicked gain indeed. But where a general convenience is involved, it constitutes a preponderating consideration, unless in itself it also produce a general mischief, or no compensation is awarded for the invasion of private right. Compensation is in this case amply provided for by the inquisition of a jury upon the amount of damages. The general mischief consists in corrupting the atmosphere, so as to affect the general health of the neighborhood. If it extend only to one family, it cannot, as a general rule, be held a nuisance, under this head, to be redressed by abatement or injunction. A case may arise, as supposed at the bar, of the pond of an insignificant mill, throwing off vapours destructive to the healthfulness of a large landed estate; a case, in which between the public convenience and private suffering there is no kind of comparison; wherein the court would act. But the circumstances must be specially shown. None such appear here. There is nothing in this case but the interest of a single individual, to weigh against public utility. This will not suffice. We must take notice, that in this climate a less injury than that can hardly be expected from any mill. We must take notice, that the legislature was as much aware of that fact as we are; and yet that they have encouraged the building of mills by restraining successive actions for the private injury, and also authorized the County Courts to order the building on the lands of another, unless the mill would "create a nuisance *to the neighborhood.*" (*Act of* 1777, *Rev. c.* 122.) This is an exposition of a principle from the source of the law, which the court must respect.

The erection of mills where they are not nuisances, being authorized by law, a court of equity will not restrain the erection of one, simply because it affects the health of one family.

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It might be material too, that the plaintiff, and those under whom he claims, submitted for forty years to this grievance; that he bought his land in 1795, while it subsisted, and allowed its continuance for five and twenty years. That is indeed no positive bar to a remedy; but it is a powerful reason, why this court should leave him to his legal remedy. He and the defendant must both have calculated the value and the inconvenience of the mill, and its attendant consequences, when they made their purchases.

But the stress of the case lies in the other circumstances. Less harm cannot follow the building of a mill in the alluvial region of the State, than the rendering of one plantation less salubrious. To perpetuate this injunction, would be to issue one against the erection of another mill below the falls in our rivers.

The cases heretofore in this court are entirely distinguishable. *Attorney-Gen.* v. *Blount*, and *Attorney-Gen.* v. *Hunter*, were founded on facts diametrically opposite to the present. There the *health of towns* was put in jeopardy. *Crudup* v. *Carpenter** turned materially on the contract, and the extent of damage, ascertained by the verdicts at law, in comparison with the value of the mill property. Upon neither of those principles, nor any other compatible with legislative policy or chancery precedents, can this bill be sustained. It must therefore be dismissed with costs.

PER CURIAM.—BILL DISMISSED.

EDMUND D. McNAIR v. THOMAS RAGLAND.

As many executions, of any kind, as the plaintiff chooses, may be sued out on the same judgment—but if executed wrongfully, or irregularly, it is at his peril.

At this term, *Seawell*, *Gaston* and *Badger*, for the plaintiff, moved for several writs of *fieri facias* on

* This case was not reported, as it was decided solely upon the special terms of an agreement.

the decree entered against the defendant at the last term, (*ante* 1 *vol.* 516) directed to the sheriffs of several different counties; suggesting that the defendant removed his slaves from county to county, so as to prevent a seizure of them.

The counsel admitted, that such practice had not been common in this State, but contended that it was perfectly well settled in England; and they cited *Tidd's Practice* 1032. *Primrose* v. *Gibson* (16 *Eng. Com. Law* 78) and *Miller* v. *Parnell* (1 *Id.* 414.)

Nash & Winston, for the defendant.

RUFFIN, Judge.—A motion has been made in this case, for liberty to sue out two or more writs of *fieri facias* to different counties. Such a practice has not yet prevailed generally in this State; though in one part of it, I learn, that, at one time, it was common to return, in vacation, a writ to one county, and take out another for a different county. The convenience and utility of the practice are so apparent, that the court felt from the beginning no difficulty in granting the motion, but the want of a precedent. It is just and reasonable to give a creditor every facility for the security and collection of his debt; which is the more necessary here, since a most valuable portion of the property of our citizens is so easily removed from one county to another. And we are glad to find, that it is a well known proceeding in England, to sue out as many executions as the party chooses; he taking care how he uses them. For if he abuse the process, the court would unhesitatingly set it aside, and leave him exposed to the action of the person aggrieved. If he sue out a *fi. fa.* and proceed on it, he cannot execute a *ca. sa.* until a return of the other, and a proper credit on the process against the body. This is necessary, that the officer may know the sum for which he detains the prisoner. And he levies both writs of *fi. fa.* under a responsibility for seizing too much. He must take care not to sell upon the second seizure, until he has done so under the first, and given the proper credit.

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If a *fi. fa* and a *ca. sa.* are both sued out, the latter cannot be executed until the former is returned.

Mr. Tidd states the suing out of two writs of *fi. fa.* to be a settled practice (*Tidd's Pr.* 1032). And the cases of *Miller* v. *Parnell* and *Primrose* v. *Gibson*, are instances of a *fi. fa.* and a *ca. sa.* issued at once. There were motions to set them aside; but the court said it was perfectly regular—only the *ca. sa.* could not be acted on after a levy of the *fi. fa.* until either a sale or due discharge of the effects. The result of our examination is, that the plaintiff may sue out what executions, and as many of them as he chooses; but he acts on them wrongfully, or irregularly, at his peril.

PER CURIAM.—MOTION ALLOWED.

JAMES BROWNING *and* ELIZABETH *his wife*,

v.

WILLIAM N. PRATT *and* MOSES S. PRATT.

No decree can be pronounced for the plaintiff, upon a bill suggesting fraud in procuring a deed and praying to have it cancelled, and for a re-conveyance, where the answer and proofs do not support the allegations, but establish a case entitling the plaintiff, upon a proper bill, to a redemption.

This bill was filed in Orange, and alleged that the plaintiff *James* was seised in right of his wife, the plaintiff, *Elizabeth*, of two tracts of land containing two hundred and twenty-five acres, worth $500; that he had obtained a judgment before a justice of the peace, against one *James*, execution upon which issued to the defendant *Moses*, who was a deputy sheriff, and was levied upon some horses, which the plaintiff, *James*, contended to be the property of the defendant in that execution. That the plaintiff finding they were claimed by one *Warren*, refused to litigate the question of property in the horses with him, but that the defendants pretending great friendship for the plaintiff, advised him that there was no danger, and prevailed on him to have the horses levied on. That the defendants informed the

plaintiff *James*, that before a sale could take place, it was necessary for him to sign a writing; that being entirely illiterate, and confiding in the friendship of the defendants, the plaintiff, *James*, executed the writing, without having it read to him—and thereupon, a sale of the horses took place, when they were bought by the defendant, *William*—that afterwards, *Warren* recovered of the defendant, *Moses*, in an action of trespass for seizing the horses, and the plaintiff was informed that his land must be sold to satisfy the judgment—as the paper he had executed was a deed conveying his land, in trust, to secure the defendant, *Moses*, in selling under the execution. That at the sale, the land was cried by the defendant, *Moses*, and was purchased by the defendant, *William*, for $ 80—that after the sale, the defendants tendered to the plaintiff, *James*, two deeds and informed him that the land now belonged to the defendan *William*; but that if he, the plaintiff, would sign those deeds, he might redeem it by the payment of $ 100 within two months. That being as yet entirely blind to the arts of the defendants, and informed that the deeds contained a clause for redemption, the plaintiff not only executed those deeds, but procured his wife, the plaintiff, *Elizabeth*, to do so likewise—that within two months, *John Redmond*, the father of the plaintiff *Elizabeth*, tendered the sum of one hundred dollars to the defendant *William*, and demanded a reconveyance in behalf of the plaintiff *Elizabeth*, which was refused. The bill then charged, in strong terms, a fraudulent conspiracy between the defendants, to take advantage of the confidence of the plaintiff *James*, and by false and fraudulent representations, rendered effective by his extreme ignorance, to cheat him out of his land, averring that the defendants had procured from him absolute conveyances, without paying any consideration, and prayed that the deeds might be cancelled, and for a reconveyance.

The defendants, in their answer, admitted the fact of the plaintiff's having obtained a judgment against *Jesse James*, and of the levy upon the horses claimed by *Warren*; but they denied having, by any representations, in-

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duced the plaintiff to press a sale of those horses; on the contrary, they averred, that the plaintiff had, of his own accord, applied to the defendant *Moses*. to sell, and to the defendant *William*. to buy. That the defendant, *Moses*, refused to sell under the execution, unless the plaintiff would indemnify him, which the plaintiff then verbally agreed to do—that the defendant, *William*, refused expressly to purchase, unless the plaintiff would give him a written indemnity against the claim of *Warren*, which the plaintiff agreed to do, and which was then drawn and executed. That *Warren* had recovered of the defendant *William*, the value of the horses, and the plaintiff having absconded, an attachment against his property was sued out, upon the indemnity given the defendant *William*—that before the return day of the writ, the plaintiff applied to the defendant *William*, and entreated him to take it up, stating, that if returned, it would only cause an accumulation of costs, and averring his willingness to have his, the plaintiff's, property sold, to satisfy the execution in favor of *Warren* against the defendant *William*—that this offer was accepted, and an agreement to that effect drawn and signed by the plaintiff—that in pursuance of this agreement, a sale of the property of the plaintiff was advertised by him, at which many people attended—that the plaintiff attended, and delivered the property to the crier, who was the defendant *Moses*, and who acted at the request of the plaintiff—that the personal property of the plaintiff was very small, and did not produce a sum sufficient to satisfy the execution; and thereupon, a tract of land, containing one hundred and twenty five acres, was offered for sale—but the plaintiff, *Elizabeth*, refusing to join in the conveyance, the life estate of the plaintiff, *James*, was sold, and purchased by the defendant *William*, for $20—that these sales left about $80 of the debt unsatisfied, which was more than the plaintiff, *James'* life estate in the other tract, upon which he lived, would sell for, and that the defendant, *William*, on the evening of that day, agreed to buy the tract for that sum, if the plaintiffs would join in a deed to him. That the

plaintiffs consented to these terms, upon condition of being permitted to redeem within two months, which was agreed to, and thereupon a deed was executed by the plaintiffs to the defendant *William*, for the land—but that the plaintiff, *Elizabeth*, had subsequently refused to consent to the same, upon her privy examination. That no clause for redemption was inserted in the deed, not for any fraudulent purpose, but because no expectation had been entertained of selling any title but that of the plaintiff, *James*, and the deeds had been prepared before the sale. The defendant *William*, denied positively, that the agreement for redemption extended to both tracts, and insisted that it was confined to the home plantation. He admitted a tender of $100 by *Redmond*, and a demand of a reconveyance of both tracts, and his refusal to comply; but averred, that he then stated to *Redmond*, that he was willing to reconvey the home tract, upon the repayment of $80, but that this proposal was rejected by *Redmond*.

Replication was taken to the answers, and many depositions filed. They all supported the answer, except as to the fact whether the agreement for redemption extended to both tracts, or was confined to the home plantation. Upon that point, the evidence was contradictory.

The cause was submitted by *Badger*, for the plaintiffs, and *Nash*, for the defendants.

RUFFIN, Judge.—The court would gladly in this, as in every case, administer justice according to the true rights of the parties, as collected from any part of the pleadings or proofs. There seems to have been an agreement for the redemption of the home tract; and if the frame of the bill put it in our power, that would be decreed. But the case is there stated in a manner so foreign from the truth, and with a view to relief so entirely different, as not to put in issue the question of redemption, and render any of the examination of the witnesses to that point relevant or competent; or even to authorize a decree upon a particular admission of the defendants.

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Browning v. Pratt.

The wife is an unnecessary party to a bill to set aside a deed for her land, fraudulently procured from her husband alone.

His Honor here repeated the substance of the bill as above stated, and proceeded as follows: The first observation which the case, thus stated, calls for is, that the wife was improperly made a plaintiff. Her rights were not affected, as she did not execute the deed of trust, or any other conveyance, according to the charges of the bill. The deed, if any, was that of the husband, and operated upon his own estate only. For which reason the bill of the wife would necessarily be dismissed.

But upon the answer and proofs, it turns out, that not one material allegation of the bill is true. There was no deed of trust, nor a conveyance of any sort, obtained from *Browning* before the sale. There was no pretence of selling under such authority. There was no fraud or deception in obtaining a sale, or in the defendant's purchase. The answer states, and witnesses on both sides prove, that for a just demand, the defendant *William* was about suing *Browning*, who besought him not to do so, and agreed to raise the money by a sale of his property without suit. That accordingly, he himself advertised the sale, and was present at it; that he delivered the articles for sale, and got the defendant *Moses* to cry them; and that, at such public sale, the defendant *William* purchased one of the tracts of land, and on the evening of the same day, by agreement and deed, made and executed in the presence of a crowd of people, purchased from *Browning* and wife the other tract. This obviously answers the whole bill; and being proved to be true, annuls all the equity alleged.

But the answer, going beyond the matter of the bill, admits that at the sale the defendant *William* purchased one of the tracts of land at $20, and took a conveyance from *Browning*, whose wife would not join in the sale and conveyance, which caused it to sell so low. It further states, that $80 yet remained to be raised, and that *Browning's* life estate in the other (home) tract would not bring it; but that he, *William*, proposed to give that sum for it, if the husband and wife would both convey that tract in fee to him: and it further admits, that this last tract was to be subject to redemption by *Mrs. Browning*,

if she should repay the same sum within two months, and that under that agreement *Browning* and wife did convey the home tract, tho' she refused to execute the deed for the other, and hath since refused to be privily examined to that which she did execute. To this statement there is full proof by many witnesses on each side, in every particular but one: that is the point, whether the agreement for redemption extended to both tracts, or related to the home tract alone. For it seems, that *Mrs. Browning's* father afterwards tendered $100 on her behalf, and claimed a reconveyance; which the defendant refused as to the first tract, but offered for $80, as to the home tract. But that was not accepted unless both pieces could be got; and thereupon this suit was brought. Upon the proofs on this disputed point, the preponderance is, in the opinion of the court, with the defendants, were it proper to consider them. But as they are manifestly out of the pleadings, they cannot be heard; for they are not material to any issue between the parties, and consequently have no sanction for their truth.

Proofs which are not material to any issue between the parties cannot be read upon the hearing.

Will the answer of the defendants authorize a decree to the extent of the admissions made in it? In some cases it might. For it is not necessary that the bill should precisely allege every matter in accordance with the proofs, or the admissions of the answer. But it is requisite, that its statement should have some semblance of the reality; and that an admission in the answer, to be acted on, should have reference to, or bearing on the case made in the bill, and not be in entire avoidance of it. Here a simple question of redemption, in which the real controversy is confined to the single point of fact, whether one or two tracts of land should be redeemed, is altogether disguised, and turned into a case of aggravated fraud made up of falsehood, oppression, breach of confidence, treachery, and undue advantage taken of an illiterate man; on which is founded a prayer to cancel the deeds, or for an absolute reconveyance. The court cannot give relief contrary to that asked for, and on a case, tho' appearing in the answer, standing directly

The plaintiff sometimes obtains a decree solely upon the admission in the answer, but the admission must have some reference to the case made by the bill and not be entirely in avoidance of it.

Relief never can be given which is directly contrary to the prayer of the bill —as if the prayer is, that a deed

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opposed to that stated by the plaintiff. When the plaintiff asks us to rescind a contract upon a fraud of this sort, we cannot affirm an essentially different contract, and decree relief on it as affirmed. Upon a case and prayer to cancel deeds, we cannot set them up, upon the ground of a fair, specific agreement for redemption, and decree such redemption. The charge and the admission are nothing alike, and do not relate to the same transaction. It is not like holding fraudulent deeds to be a security for advances under them. Justice to defendants demands this much at least from the court: that they should be enabled from the allegations in the bill to form some intelligible notion of the ground of complaint, and the nature of the redress sought. And a respect for the perspicuity and certainty of judicial proceedings, and professional proficiency likewise prescribe the duty to the draughtsman, to put into the bill such statements as will convey to the court, at least an outline of the case, and some idea of the principle on which the relief is sought.

be cancelled, a decree in affirmance of it will not be made.

To give any relief in such a case as the present, would be allowing a latitude or laxity of statement, incompatible with the rules of equity pleading, with the ease of the court, and a just regard to the rights of the defendants generally. Indeed it might be against the interests of the plaintiffs themselves; for upon a proper bill, they may be let into proof, and be able to prove, that both tracts were included in the agreement for redemption.

The bill must therefore be dismissed at the cost of the plaintiff, *James Browning*. No costs are given against the wife, because the suit is founded on matter happening altogether during coverture, in which her interest, according to the bill itself, is not in the least concerned. It is not considered her suit therefore; and it is supposed, that the defendant's costs are sufficiently secured by the prosecution bond. At all events, the wife was improperly, and without her consent, made by her husband, or the solicitor, a party, as far as appears to the court; and therefore costs are not given against her.

Costs are not given against a married woman in a suit for matters occurring after the coverture, and to which she is an unnecessary party.

PER CURIAM.—BILL DISMISSED.

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MARY S. CLARKE *et al.* v. SPENCER D. COTTON *et al.*

An executor is not liable for *laches* in not enforcing the payment of a debt due the testator, from a co-executor who becomes insolvent after the probate of the will.

The case of *Potter* v. *Stone* (2 *Hawks* 30) approved.

The bill, which was originally filed in Edgecomb, in the year 1829, alleged, that *Mary S. Blount* died in the year 1823, possessed of a large personal estate, which she bequeathed, in different proportions, to the plaintiffs, some of whom were infants; that she appointed *Spencer D. Cotton*, *Benjamin F. Jackson*, *Moses Mordecai* and *Hutchins G. Burton*, her executors, all of whom proved the will—and that *Moses Mordecai* died soon after the probate. The surviving executors and the executrix of *Mordecai* were made defendants; and the prayer was for an account of the personal estate of the testatrix, and payment to the plaintiffs of their respective legacies.

The defendants *Cotton* and *Jackson*, in their joint answer, admitted all the allegations of the bill. They further stated, that they, together with *Mordecai*, proved the will at the February term, 1823, of Edgecomb County Court—that the defendant *Burton*, had, from the death of the testatrix, declared his intention to accept the office of executor, but was unable to join in that probate—that he proved the will at the succeeding August term. That the principal part of the estate of the testatrix came to their hands—that the defendant, *Burton*, owed the testatrix $2889,50, with interest from the 2nd May, 1821, secured by a promissory note of that date—that the testatrix resided in Edgecomb, but had a small plantation in Warren County, in the vicinity of *Burton's* residence—that personal property on that estate was sold to the amount of $683,21, of which *Burton* purchased, to the amount of $420,85, and that the notes given by the purchasers at that sale, including his own, were handed to him for collection. They submitted to an account, but insisted they were in no man-

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ner liable for the debt due from *Burton* to the testatrix, in her lifetime, nor with the collections, including his own purchases, made by him since her death.

It is unnecessary to state the answer of the defendant, *Burton*, as he was examined before the commissioner, and the facts stated in his answer appear in the report.

By an interlocutory decree, a reference was ordered of the accounts of all the defendants, and the commissioner reported, that the defendants, *Cotton* and *Jackson*, had received of the assets of their testatrix, including interest, $20,853 03—that after the payment of all the debts, there remained in their hands, subject to the payment of legacies, $18,351 91—that they had paid legacies, including interest upon the payments, to the amount of $8,156 98, and after allowing them commissions on the sum of $41,707 86, the amount of their receipts and payments, including legacies and interest, at the rate of 5 per cent, there was a balance in their hands of $8,109 54, and that he had rejected a charge made by them of $478 20, for expenses of two journeys to the State of Tennessee, upon the idea that the defendants were not entitled to their expenses, and also to full commissions. That the defendant, *Burton*, had received from the defendants, *Cotton* and *Jackson*, including interest, $930 68, in notes due for purchases made at the residence of the testatrix near his house, and had disbursed for debts due from the testatrix, the sum of $852 63; and that, after allowing him commissions on these disbursements, there was due him a small sum, to be applied to the payment of his note above mentioned. That as to the note of the defendant *Burton*, due the the testatrix in her lifetime—*Burton* was a gentleman of large property at the death of the testatrix—that shortly thereafter, his affairs became embarrassed, and he was forced to make a general assignment of his property, and was now insolvent—that the testatrix had in her will left him all her slaves, thirty in number; that these slaves were upon her estate in Warren; and that the defendants, *Cotton* and *Jackson*, assenting to the

legacy, *Burton* had taken them into his possession; that they had been sold at execution sales of *Burton's* effects, and that a part of them were purchased by *Cotton*.

The plaintiffs excepted to the report:

1st, Because the commissions allowed to the defendants, *Cotton* and *Jackson*, were too large, and were allowed upon a wrong principle.

2d, Because the commissioner had not charged the defendants, *Cotton* and *Jackson*, with the note for $2,889 50, and the interest thereon, due from the defendant, *Burton*, to the testatrix in her lifetime.

3d, Because the commissioner had not charged the defendants, *Cotton* and *Jackson*, with the note of the defendant *Burton*, for $ 420 85, and the notes placed by them in his hands for collection.

The other exceptions of the plaintiffs related to the account of the defendant *Burton*.

The defendants, *Cotton* and *Jackson*, excepted to the report, because the commissioner had rejected the charge of $473 20, for expenses incurred.

Devereux, for the plaintiffs, contended:

1. That the defendants *Cotton* and *Jackson* ought to be charged with the debt of *Burton*, due the testatrix, as if he had been a stranger, and cited *Tebbs* v. *Carpenter* (1 *Mad.* 290) *Raphael* v. *Boehm* (11 *Ves.* 92) *S. C.* (13 *Ves.* 407) *Ld. Montford* v. *Ld. Cadogan* (17 *Ves.* 485) *S. C.* (2 *Mer.* 3) *Powell* v. *Evans* (5 *Ves.* 839) *Lowson* v. *Copeland* (2 *Bro. C. C.* 156) *Eagleton* v. *Kingston* (8 *Ves.* 466).

2. To the objection, that *Burton* had the same right as the other defendants, who could exercise no control over him, he cited *Smith* v. *Sykewell* (3 *Atk.* 566) *Edmunds* v. *Bird* (1 *Ves. & Bea.* 542) *Smallpiece* v. *Anguish* (1 *Ch. Ca.* 75).

3. That although *Burton's* appointment ousted the other defendants of their right to redress in a court of law, they had a remedy in equity, and ought to have availed themselves of it. (*Lepard* v. *Vernon* 2 *Ves. & Bea.* 51 *Atkinson* v. *Henshaw Id.* 85 *Ball* v. *Oliver Id.* 96 *Bone* v. *Cooke* 13 *Price* 322).

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4. That if the defendants had no right to compel payment from *Burton*, either at law or in equity, they clearly had, in this court, the means of securing the debt upon the negroes bequeathed to him.

Upon the other exceptions, he referred to *Potter* v. *Stone* (2 *Haiwks* 30) and to the argument in the case of *McNair* v. *Ragland*, at the last term.

The *Attorney General* and *Gaston*, for the defendants *Cotton* and *Jackson*, gave up the question of commissions, and argued that *Burton* had as much right to retain the debt due by him to the testatrix, as the defendants *Cotton* and *Jackson* had to demand it—that it was assets in his hands—that had he voluntarily paid it to them, he would have been responsible for its proper application.

In support of the exceptions filed by the defendants, they contended, that under the act of 1799 (*Rev. c.* 536) an executor had a right, not only to claim his commissions, but also for expenses necessarily incurred.

RUFFIN, Judge.—The only exception on the part of the defendants is, that the commissioner rejected a credit claimed by them, for actual expenses and charges paid. The fact of payment, and fairness of the payments are not disputed. The commissioner decided on the idea, that the allowance could not be made, because the commissions covered the claim. But he was wrong; for the act of 1799 (*Rev. c.* 536) has an express proviso, that the executor may retain for charges, over and above his commissions. The charges of travelling, employing agents, or costs of suit might overgo the commissions; which are designed for the executor's risk and labor. The exception must be allowed.

An executor may retain for necessary expenses, in addition to his commissions at the rate of *5 per cent* upon the receipts and disbursements.

The plaintiffs have taken several exceptions. One relates to the commissions allowed *Cotton* and *Jackson*. The commissioner has allowed five *per cent* on the receipts, and the interest thereon, up to taking the account, and also five *per cent* upon the disbursements in payment of debts, and on payment to the legatees, and the balance now in the hands of the executors. Commissions cannot

be given on the payments to the legatees, made or to be made. (*Potter* v. *Stone* 2 *Hawks* 30.) They may, in the discretion of the court, be allowed on the other items; but as actual expenditures are claimed and given here, a commission of five *per cent* on the principal sums received, namely, $18,711 65, is an adequate compensation. This exception is therefore allowed.

Commissions are not allowed upon payments to legatees.

Another, and the most important exception is that which relates to the debt, due from *Burton* to the testatrix at her death. He owed her upon his own bond the sum of $2889 50, and hath become insolvent. The commissioner has not charged the other executors with that debt; and this exception is founded on that omission. It is said, they are liable, because the debt was lost by their culpable negligence; and evidence has been taken to show, that *Burton's* circumstances became doubtful, and then ruinous, after the death of the testatrix: and that *Cotton* and *Jackson* were aware of it. The circumstances have been commented on. They are not gone over again now, because the decision is on a general principle. Tho' if the defendants' liability depended on their knowledge and *bona fides*, it might be difficult to charge them here. For according to the evidence, *Mr. Burton's* failure was sudden, and caused by unforseen circumstances; and at least, unknown to the world and his co-executors, until he made a general assignment of a very large estate, and converted himself, in an instant, from a man apparently affluent into an insolvent one. But it is a new position, that one executor is responsible for the acts of another, where the former has done nothing. The rule has been often laid down, that he is liable, not for standing by, but for parting with assets once under his control. An executor is not liable for money never in his power, upon the insolvency of a co-executor with the effects in his hands. Suppose a testator appoints an executor insolvent at the time. Can a co-executor say, he shall not prove the will, nor receive the assets, contrary to the appointment in the will? By what authority can he say, the testator had a false confidence? But it is said, if the insolvency take place afterwards, it is the

An executor is not liable upon the insolvency of a co-executor, for assets which he has never had under his control.

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duty of the other to receive the fund, because he is a trustee; especially where there are infants and others, not *sui juris*. That the legatees themselves may come into this court to secure their legacies is very true. Upon that is bottomed the argument for the power of the co-executor, and thereupon, his duty. That does not follow. That an executor is a trustee, is not denied. But how far, for what? is the question. He is trustee for what is in his hands; or what has been in his hands, or within his separate power and control. He is not the curator or guardian of the legatees, as against the insolvency of the other executor. It may be doubted, whether he could call the other to account. Upon what principle could he ask the other to pay him the money in his hands; and thereby make him liable for his own insolvency, which may happen? Both, as against each other, derive their power from the same source, and hold an equal measure of it. But there is no necessity for such an obligation on the executor. For since the legatees may themselves sue, their redress is in their own hands; and they cannot complain, that an executor did not sue, while they themselves lay by. But if one executor may call the funds out of another's hands, is he bound to do it? The very power of the legatee, and his own *laches* is an excuse for the executor. There is no need of a suit by both, and the legatee's example justifies the executor. But the want of a precedent is decisive upon this question. No case has been cited or found, that looks that way. Those mentioned are altogether upon different points. *Atkinson* v. *Henshaw* (2 *Ves. & Bea.* 85) and *Ball* v. *Oliver* (2 *Id.* 95) establish only, that pending a litigation for probate in the Ecclesiastical Court, the chancellor, upon a bill by any body interested, will appoint a receiver, as a better security than an administration *pendente lite*. But that does not establish, that after probate, the executor shall not receive the assets, because he is insolvent, though the testator said he might, and the legatees are willing he should, or at least, do not ask that he shall not. *Lepard* v. *Vernon* (1 *Ves. & Bea.* 51) is a case, where one executor (not insolvent) as-

Legatees can come into equity, to secure themselves against the insolvency of an executor.

But it does not follow that an executor can compel an insolvent co-executor to account; and it seems that he cannot.

signed a debt, not negotiable, and the debtor refused to pay, but brought the money into court. Upon the bill of the other executors, it was decreed to them for the general creditors, against the assignee: who had no legal title, and no higher equity than the general creditors. But that is no authority, that the executor, whose assignment passed nothing, could not have received from the debtor himself, if such had been the fact. This being a debt from the executor himself, due to the testatrix in her lifetime, became assets in the executors' hands upon her death, for the satisfaction of creditors and legatees. If he had paid it to the other executor, it would not have excused him to the creditors; and there ought, therefore, to be no means of compelling such a payment. The delivery of the negroes, bequeathed to *Burton*, did not alter it. He had, as executor, the same right to them that they had; and it was a specific legacy, which does not abate. This exception is therefore overruled.

Executors have no right to charge a specific legacy bequeathed to a co-executor, with a debt due from him to the testator.

The other exceptions relate to transactions occurring after the death of the testator. Before *Burton* qualified as executor, he purchased at a sale made by the others, to the amount of $ 420 85; and the executors also left with him, as an agent, for collection, the bonds of other persons residing in his neighbourhood, which he received. The whole, including his own purchases and the interest, makes the sum of $ 930 68. This the commissioner has also charged to *Burton* alone; and the report is excepted to, because he did not charge it to the three. I am free to say, that if the question stood on these facts alone, the liability of the others is very probable; because they could have sued at law on the bond taken to themselves for $ 420 85; and as to the other, they appointed an agent, who had it in his power, by acting as executor, to put them at defiance. But those difficulties are removed by other facts, appearing on the report. Those monies he did apply, under the authority of the other executors, to the payment of debts of the testatrix, except the sum of $ 78 03. Consequently, nothing was lost by the confidence reposed in him in this respect, except the above small balance. And that is more than covered by the

Per RUFFIN, J. Where one appointed an executor purchases at the sale of the assets, before he has proved the will, and his co-executors deliver him his own note, and also others, for collection, and the debtor afterwards proves the will, and becomes insolvent, the co-executors are liable for the amount of his purchases and collections.

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commissions allowed him; which makes a balance of $15 01 due him, and applicable to his large debt. Those exceptions are therefore overruled.

The exception as to *Mr. Burton's* account, is partly correct, as the commissions allowed are too heavy; but the difference is so inconsiderable, as not to induce the court to interfere in such a way, as to alter the state of the accounts of the other executors. It is therefore allowed, to the extent of $15 01, so as to leave the balance due from said *Burton*, of $2,889 50, instead of $2,874 49, as reported; and for the residue, it is overruled.

But disbursements by the insolvent in payment of debts of the testator, made by directions of his co-executors, shall exonerate them *protanto*, and not be applied to a debt which he owe the testator in his life-time.

HENDERSON, Chief-Justice.—I concur with Judge RUFFIN in the opinion, that the two solvent executors should not be charged with the bonds delivered by them to *Mr. Burton* for collection, or for his purchases at the Warren sales; not only for the reason given by him, that *Mr. Burton* has accounted for both in his disbursements for the estate, but because they were not answerable if he had not. *Mr. Burton* must be viewed, in the collection of the bonds, either as the agent of *Cotton* and *Jackson*, or as their co-executor. If as the first, they can be liable only because the appointment was an improper one, or that they have failed to call him to account in due time. For I presume it will not be controverted, that executors must sometimes act by agents; and that this was a proper case for the appointment of an agent (the collection of distant debts). As to the improvidence of the appointment, I will not examine the evidence, to show that the appointment was not an improvident one; or rather that the plaintiffs cannot allege it to be so; for I view this as emphatically the case of *Mrs. Blount*. She, although in her grave, is the plaintiff. It is for a *breach of the confidence* reposed in the defendants *by her*, that this claim is founded. It is her charities, her benevolences, which it is alleged, have been defeated by it. And therefore there can be no standard appealed to with so much propriety, to test the fitness of an agent to act in the business, as the one which

Per HENDERSON, C. J. Where it becomes necessary for an executor to employ an agent, the appointment of one who was nominated as co-executor, but never proved the will, is justified by the confidence reposed in him by the testator.

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she herself has left. There is a moral conclusion, by which the plaintiffs are estopped to deny the fitness of the agent. But it is said, that the appointment was improvident, because the person selected had the capacity to assume a character which would render him entirely irresponsible, and that the defendants knew it, and the agent did in fact assume that character; that he qualified as one of the executors of the will. It is true that he had that capacity; that the defendants knew it; and that he has assumed that irresponsible character. But it is equally true, that this capacity was given to him by the real plaintiff, the testatrix, with a view that he might act in this very charge, and in things of much more importance, which he has done, as her executor, in discharging the trusts of the will. Can this capacity be imputed to the agent, as a disqualification or as rendering his appointment improvident, and himself unworthy to be entrusted with the collection of a few hundred dollars out of many thousands, which the testatrix contemplated coming into his hands? Can we impute the capacity which the testatrix gave him of assuming a character, which would invest him with power over the whole estate, as calculated to render him an improper agent to act in a very small part of it. Much less can one who gave the capacity, or those who claim her charities or bounties, allege it as an act injurious to the estate. The reasoning which would lead to such a conclusion may be systematic, and therefore beautiful. We may admire it, as we are led from one stepping stone, or resting place to another; but in my estimation, it will not stand the test of analysis.

It makes no difference, that the agent may, by proving the will, place it out of the power of his co-executors to call him to account.

The next ground to charge *Cotton* and *Jackson* is, that they had the fund in their hands, and permitted it, or rather by their act caused it to pass into the hands of their co-executor; and on that ground they are chargeable; and a great number of authorities were cited. I will not examine each case, but I think the result of the whole taken together is this: that where one executor has the fund or evidence of debt in his hands, and he *voluntarily and unnecessarily*, or *without an apparently*

Per HENDERSON, C.J. Where one executor delivers over assets

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to his coexecutor *bona fide*, and for a purpose apparently beneficial to the estate, he is not responsible for the conduct of his coexecutor.

proper motive, permits it to pass into the hands of a coexecutor, he is responsible. For if no proper motive can be assigned, a bad one must be imputed; as men seldom act without a motive, and if he who best knows will not show it, the presumption is, that it is not a good one. The most charitable motive, which under such circumstances can be assigned, is a desire to avoid responsibility; which is a bad, or at least not a good one. But where the apparent good of the estate, and I should add, the reasonable convenience of the executors required, a fund or evidence of a debt may safely change hands: here the apparent good of the estate required, that the evidences of debts should be placed in the hands of him, under whose immediate eyes the debtors resided, as a measure of safety to the estate. By attempting to guard the trust fund by unreasonably rigid rules, a contrary effect from the one designed will be produced. Honest men will be driven from the office; and their place will be supplied by dishonest ones.

These principles also will protect the two executors from loss in taking *Mr. Burton's* acknowledgement of purchases made at the Warren sales. The case comes within the meaning and spirit of these principles.

PER CURIAM.—DECREE ACCORDINGLY.

NATHANIEL HUNT *and* WILLIAM HARRISON

v.

THE STATE BANK, MARMADUKE N. JEFFREYS *et al.*

A *bona fide* purchaser from a trustee, holding upon a personal confidence to sell the trust estate, receive the purchase money, and divide it among the *cestuis que trust*, is not bound to see to its application.

The bill, which was filed in 1821, alleged, that in the year 1816, the plaintiffs, together with the defendant *Jeffreys*, and several other persons, were sureties for one *Duke W. Davis*, to the State Bank and the Bank

of Newbern, in different notes, amounting in all to the sum of $10,000. That the plaintiffs and *Jeffreys*, to secure themselves from loss on account of their liabilities for *Davis*, procured him to convey to one *William Moore*, a valuable tract of land, in trust to sell the same, and apply the proceeds to the payment of the several debts, for which they were sureties. That *Davis* becoming insolvent, and making default in the payment of the debts thus secured, the trustee, in obedience to the directions of the plaintiffs and *Jeffreys*, in the year 1818, advertised the land, assured to him by *Davis*, for sale, when it was purchased by the defendant *Jeffreys*—that no money was paid by *Jeffreys* upon this purchase; but that with the consent of the plaintiffs, *Moore* the trustee conveyed the legal title to him, the sale being merely a means of barring *Davis'* equity—that *Jeffreys* was to sell the land for the joint benefit of the sureties of *Davis*. That in the year 1820, *Jeffreys* being indebted to the State Bank on his own account, sold the land thus held by him in trust, to that bank, and the purchase money was, by agreement, applied to the payment of the last mentioned debts. That the arrangement between *Jeffreys* and the bank, was made by *William Boylan*, the president, and that he, *Boylan*, before the conclusion thereof, had notice of the trust, upon which *Jeffreys* held the land—that *Jeffreys*, and the other sureties of *Davis*, had become insolvent, and that the plaintiffs had been compelled to pay the whole debt, for which they were bound with him for *Davis*.

The bill prayed a discovery from the president, *Mr. Boylan*, and specific relief by a sale of the land, and payment to the plaintiffs of the sums they had severally advanced, as sureties of *Davis*.

The President and Directors of the State Bank, in their answer, denied the existence of any trust in favor of the plaintiffs, in the land purchased by them of *Jeffreys*, and insisted that they were purchasers for value, and without notice—they averred, that if *Jeffreys* held in trust for the plaintiffs, that they, the plaintiffs, had not only authorized him to sell, but had actually ratified

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the sale made by him, and that they were not bound to see that the purchase money was applied to the extinguishment of the claims of the plaintiffs.

Mr. Boylan, in his answer, stated, that believing several notes held by the State Bank, upon which *Jeffreys* was an endorser, to be doubtful, he, in March, 1820, made a treaty with *Jeffreys*, whereby he purchased for the bank the land mentioned in the bill—that he gave for the land $5000, which was at least $1000 more than he would have given in cash, or undoubted securities—that when the contract of sale was made, he knew nothing of the title to the land, further than from information then derived from *Jeffreys*, viz: that he, *Jeffreys*, had purchased it under a trust deed to *William Moore*, and he denied notice of any claim or interest of the plaintiffs in or to the land; or that *Jeffreys*, in any way, held it in trust for them.

The bill was taken *pro confesso* as to *Jeffreys*, and he was examined under an order to that effect. He deposed, that the plaintiffs and himself, together with several other persons, were sureties for *Davis*, to a large amount—that to secure themselves, they procured a conveyance of all *Davis'* estate, including the land in question, to *William Moore*—that at the sale by *Moore*, he purchased that land, upon a verbal understanding and consent of the sureties of *Davis*, that he should have the sole power of selling it, subject to an account with the sureties—that in addition to that land, he also sold to the State Bank his manor plantation for $6,288—that upon these two sales, he received sundry notes, including two notes of the plaintiff *Hunt* for $1328 and $171, and one note of the plaintiff *Harrison* for $393. That when he mentioned to *Hunt* the terms, upon which he had sold the land purchased of *Moore*, he, *Hunt*, expressed much satisfaction and delight—that afterwards, the persons interested in the sale met at his house, to settle the proportion of the purchase money, respectively due them, but that an altercation ensued, and they separated without coming to any conclusion, and that then, for the first time, *Hunt* expressed his dissatisfaction with the sale. Upon

his cross examination, he stated, that while *Mr. Boylan* was at his house, when the treaty of sale was concluded, he wrote the following letter to the plaintiff *Hunt*:— "I have a chance of selling the *Davis* tract of land at "$5000 taken up in bank. As there has been some- "thing said about it, I wish you to come up immedi- "ately. *Mr. Boylan* is at my house, and will wait till "I have a return." That *Mr. Boylan* did not, as he thought, know of the writing of that letter, but was aware of *Hunt's* claim on the land.

The case was submitted without argument, by *Seawell & Badger*, for the plaintiffs, and by *Hogg & W. H. Haywood*, for the defendants.

HALL, Judge, after stating the case as above, proceeded: From every circumstance connected with this case I am led to believe, that *Jeffreys* had authority to sell the land, but was to apply the purchase money for the benefit of the plaintiffs and others, interested in the deed of trust to *Moore*; and as he was authorized to sell the land, no distrust of his fidelity in accounting for that purchase money was manifested at the time of the sale. The substance of the complaint then is, not that he sold the land, but that the plaintiffs have been defrauded of the purchase money; and the question arises whether the bank is liable for the misconduct of *Jeffreys*, the trustee? If there was any ground to believe, that there was any collusion or contrivance between the officers of the bank and the trustee, our decision would be different. The defendant, the president of the bank, denies that he had notice of any trust, on behalf of the plaintiffs; but I cannot rest upon that. *Jeffreys* in his deposition proves something very much like notice. He is asked whether *Boylan* knew, that the plaintiffs *Hunt* and *Harrison* had any interest in the sale of the land in controversy. He answers, that he had, so far as regarded *Hunt*. And this corresponds with the note of *Jeffreys* to *Hunt*, that "*Boylan* was at his house, and would wait till he had a return" to that note. But admitting that *Boylan* had notice, what was it? That *Jeffreys* had an-

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thority to sell the land, and that there was a personal confidence reposed in him, that he would properly apply the proceeds of the sale, for the benefit of those interested in the deed of trust, executed by *Davis* to *Moore*. There was no trust or equitable lien upon the land in the deed from *Moore* to *Jeffreys*. *Jeffreys* held a clear title to the land. But it was admitted by all concerned, that the sureties had an interest in it. And if *Boylan* knew it also, how impossible it was for him to know of the particular advances made by each surety, and what particular part of the purchase money he was entitled to receive. It appears, that some debts were paid by the sale of the land, for which *Jeffreys* was personally responsible. But it also appears, that he sold for a great price, more than $6000, some of his own lands to the bank; so that, independently of his own debts paid off by the sale of the two tracts of land, he received bonds and money to a considerable amount; perhaps enough to enable him to do justice to the plaintiffs, if he had had no other resources. But he has not been called upon by process of law, as far as appears, to come to a settlement with the plaintiffs. And if the bank was even ultimately liable to the plaintiffs, for the purchase money, it would be iniquitous that they should be called upon to pay it twice, when *Jeffreys*, to whom they have once paid it, had not been called upon to account.

A *bona fide* vendee, who has notice that there is a personal confidence between the trustee and *cestuis que trust*, to sell and divide the purchase money, is not affected by equities subsisting between the latter.

And especially he is not bound to notice the right of the *cestuis que trust* to portions of the purchase money where their amount is disputed.

I think, upon the whole view of the case, that as *Jeffreys* was trusted by those interested to sell the land, he was trusted to receive the proceeds of the sale; and that in the absence of collusion and fraud between him and the bank, the latter is not liable. None has been proved. Full value was given by the bank for the land, and it does not even satisfactorily appear, that *Jeffreys* has misapplied the consideration, which the bank gave for the land. But I have not particularly adverted to that, as it is not now in contestation between the parties in this suit. I am of opinion that the bill be dismissed with costs.

Per Curiam.—Decree accordingly.

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WILLIAM S. BLACKLEDGE *et al.*

v.

JOURDAN NELSON *et al.*

The arrest of a debtor, upon final process, is not necessary to enable a guarantee of the debt to charge the guarantor.

After the decree for an account, made in this cause, at the last term, (*ante vol.* 1, 418) the clerk reported, that in December, 1817, the plaintiffs sold the land mentioned in the pleadings to the defendant *Nelson*, and received, among other notes, one made by *Hardie* and *Henry Smith*, for $1436 10, due November 6, 1818, "which notes were in full payment for the land sold the defendant *Nelson*, and which when paid off, discharged the mortgage," given by him to the plaintiffs. That the plaintiffs commenced suit on the note, returnable to the first court after it became due—that the suit was not put at issue until August term, 1819, of Pitt County Court, one of the defendants not being arrested, until the return of a *pluries*—that the cause was continued until November term, 1820, when judgment was entered up—that a *fi. fa.* issued, returnable to February term, 1821, which was returned *nulla bona*, and thereupon a *ca. sa.* immediately issued, upon which the defendants in the execution were arrested, and discharged under the act for the relief of insolvent debtors. Upon these facts, the clerk reported the amount of the debt, interest and costs, as still due upon the mortgage.

Gaston, for the defendant *Nelson*, excepted to the report, because the clerk had not reported that nothing was due upon the mortgage. He also insisted, in favor *Little*, a defendant, and who had purchased a part of the mortgaged land from *Nelson*, that if a decree was made for the plaintiffs, a sale of the residue of the mortgaged premises in the possession of *Nelson*, should be ordered, in the first place, so as to throw upon the defendant *Little*, only the residue of the mortgage debt, after applying to its payment the proceeds of that part still belonging, in equity, to *Nelson*.

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Hogg, for the plaintiffs.

RUFFIN, Judge.—It might well have been insisted by the plaintiffs, that the omission to arrest the *Smiths* on a *ca. sa.* had it happened, could not have been imputed to them as *laches*, which would have made that debt their own. For I know not of any rule, which requires either an agent, or an assignee of a bond, to put the obligor in prison; unless such a course be stipulated for. It is sufficient, if diligent and reasonable efforts be made to collect the money, and a failure happen by reason of the debtor's insolvency. Here the bond was put in suit at the first court after it fell due, and was prosecuted to judgment. The defendant's counsel urges the pendency of it till November term, 1820, as evidence either of neglect or of collusion with the debtors. That is not sufficient evidence of neglect; for the delay might have arisen from the state of the business in the court, or applications of the defendants for continuances allowed by the court. For we know that about that period our dockets were crowded, and seldom gone through; and that debtors often use unjustifiable shifts to put off trials. The defendants ought therefore to show the actual cause of the delay. But the fact, that at the next term after judgment the plaintiff imprisoned the *Smiths*, entirely rebuts all unfavorable inference from the delay, and repels the idea of collusion. The exception must be overruled, and a foreclosure decreed on the footing of the report of the clerk, with costs to the plaintiffs. The course in this State has not been strictly a foreclosure; but a sale of the mortgaged premises, as most advantageous to both parties.

Upon a bill of foreclosure, a sale of the mortgaged premises is directed.

The defendant *Little* alleges a purchase by him from *Nelson*; and if he had produced his conveyance, or otherwise proved it, a sale of the residue only would be ordered in the first instance. As it is, that allegation must be disregarded, and the whole sold as mortgaged.

Where a part of the mortgaged premises was sold by the mortgagor subsequent to the mortgage, a sale of the residue of the land will be ordered in the first instance, for the payment of the mortgage debt.

PER CURIAM.—DECREE ACCORDINGLY.

RICHARD NEWSOM *et al.* v. WILLIAM BUFFERLOW.

One who defends an ejectment upon an equitable title, cannot in equity recover his own costs at law, but he may those he has paid the plaintiff at law.

After the decree made in this cause (*ante vol.* 1, 379) for a reconveyance by the defendant to the plaintiffs, of the land conveyed to him by mistake, an order was made that the defendant should repay the plaintiffs the costs of the ejectment, and a reference as to those costs was directed.

Upon the coming in of the report, *Badger*, for the defendant, cited *Keaton* v. *Cobb* (*ante vol.* 1, 439).

Seawell, for the plaintiffs.

RUFFIN, Judge, after stating the order of reference, proceeded as follows: The clerk, in his report, does not distinguish between the plaintiff's own costs, when defendant in ejectment, and those which they paid the plaintiff at law, *as his costs*. The last only can be decreed to be repaid by the defendant to the plaintiffs. Their own costs the defendants at law threw away, by defending in that court upon an equitable title, and cannot recover back (*Keaton* v. *Cobb*). The clerk must again enquire upon that point, and in his report distinguish the taxed costs at law of the plaintiffs, or either of them, from those of the present defendant.

The case of *Keaton* v. *Cobb*, (*ante vol.* 1, 439) followed by RUFFIN, Judge.

PER CURIAM.—ORDER RENEWED.

CHRISTIAN L. BENZEIN *et al.*

v.

JESSE ROBINETT *et* al.

Interest upon rents and profits is not usually allowed until an account be demanded. But where the possession is *mala fide*, it is allowed from the receipt.

After the decree made in this cause, and in that of *Benzein* v. *Lenoir* (*ante vol.* 1, 255, 444) whereby payment was decreed of the mortgage made by *Monigo-*

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mery, to the *Unitas Fratrum*, and the right of the plaintiffs *Stokes* and *Wellborn* to a re-conveyance of the residue of the mortgaged premises was established, an account was directed of the rents and profits received by the defendants, and also of the waste committed by them upon the land mentioned in the pleadings.

The clerk at this term reported, that the defendants, on account of rent and waste, owed to the plaintiffs *Stokes* and *Wellborn*, $1208 principal, and $863 50 interest. In coming to this result, the clerk charged the defendants interest upon the value of the land, from the end of every year in which the profits were received by them, up to the time of filing his report. The clerk also reported the fact, that the defendants had filed with him sundry notes of the plaintiff *Stokes*, which they claimed to have set off against any balance that might be due him. Copies of these notes were certified with the report, and from them it appeared, that none of them were payable to, or endorsed to the defendants; but the legal title to most of them was in a copartnership, of which one of the defendants only was a member.

The plaintiffs excepted to the report, because the clerk had allowed a smaller sum *per annum*, for rent, profits and waste, than was justified by the testimony before him.

A statement of the facts proved before the clerk, and on which this exception was founded, is unnecessary.

The defendants excepted, 1st, To the mode adopted by the clerk in estimating the interest upon the rents and profits, insisting that no interest should have been charged before the filing of the bill.

2d. Because the clerk had not allowed them credit for the above mentioned notes of the plaintiff *Stokes*.

Seawell and *Gaston*, for the plaintiffs.

Badger, for the defendants.

Ruffin, Judge.—The exceptions of the plaintiffs are both overruled; because the allowances both for rent and damages are more than ample. The clerk gives full rent, as if the landlord had kept up repairs; and

at the same time, charges the defendants with them. Had the other side excepted for this, the amount might have been reduced, but there is no reason to increase it.

Though rents do not usually bear interest, until the filing of the bill, or an account be demanded, yet where the possession was, as here, *mala fide* from the beginning, the profits became a debt from their perception; and of course bear interest. The first exception of the defendants is therefore overruled.

Promissory notes executed by the plaintiff, and payable to persons not parties, cannot be set off against the amount reported in his favour.

The bonds mentioned in the second exception can, on no principle, form set-offs. They do not appear to belong to the defendants, except from the possession. They are not mutual debts at law or in equity, except by bringing in other facts and persons not before the court, and not stated in the answer. If indeed the obligor be insolvent, that would be a ground in this court, why they should be deemed a satisfaction of so much of the sum, as may be decreed to that party. And to enable the defendants to avail themselves of that, a petition might be filed in the cause, had the bonds been assigned to the defendants. But as other persons, namely the obligees in the bonds, would be necessary parties, a petition will not serve; and the defendants must be put to their bill, as in *Iredell* v. *Langston*. (*ante* 1 *vol.* 392) This exception must also be overruled.

If payable to a defendant, and the plaintiff is insolvent, they may be set off upon petition.

But if not payable to a party, it can only be done by bill.

PER CURIAM.—DECREE ACCORDINGLY.

NATHAN WILLIAMS *et al. executors of* ISAAC WILLIAMS

v.

ALVIN WILLIAMS *et al.*

An administrator who has paid debts of his intestate to a larger amount than the assets in his hands, is, in equity, substituted to the rights of the creditors, and may recover of the heir the sum thus overpaid.

The bill alleged, that *John Williams* died intestate, possessed of a very large personal estate, and that administration upon his estate was committed to the plain-

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tiffs' testator, who was his brother: That their testator found the affairs of his intestate in much confusion, his estate incumbered with many debts, and to a large amount: That with a view of preventing the accumulation of costs, and from motives of kindness to the family of his brother, and relying for his indemnity on the large amount of personal estate then in his hands, their testator advanced his own funds in discharge of the debts due from his brother: That after the death of their testator, upon a settlement of his accounts, it appeared that he was a creditor of his brother's estate to the amount of $3,649 27, of which sum the plaintiffs had received from the administrator *de bonis non* of *John Williams* only the sum of $2,667 34, by which payment the personal estate was exhausted. The bill then charged, that *John Williams*, the intestate, died seised of a large real estate, which had descended to his children, the defendants, and prayed that the plaintiffs might have satisfaction therefrom, of the balance still due on account of the advances made by their testator.

The defendants demurred to the bill, for want of equity. His Honor Judge NORWOOD, on the last circuit, at Johnston, sustained the demurrer, and dismissed the bill. The plaintiffs appealed.

Devereux was to have argued for the plaintiffs; but the court called on *Badger*, *contra*, in support of the demurrer.

RUFFIN, Judge.—The demurrer rests on two positions: the first is, that an administrator makes payments beyond the personal assets at his own risk, and cannot found a claim against the heir upon such over payments under any circumstances: the second, that if he can recover back the money at all, he has a remedy at law.

The bill is founded on a plain principle of natural justice. It is, that the defendants are bound in conscience to pay the plaintiffs the money, which their testator paid in discharge of the defendants' debts. In this stage of the case, we must take the debts thus paid off to be true ones, and that *Isaac Williams* really paid the

sum of $3649 27 over and above the assets which came to his hands; and that his executors have received of that only the sum of $2667 34 from the administrator *de bonis non*; and that the personal estate is exhausted. If the personal assets had been sufficient, there can be no doubt of the right of the administrator to be reimbursed out of it, for any payments made by him. His executors might retain the specific effects, until their testator's demand should be liquidated; or in this court his accounts would be settled, and a satisfaction decreed out of the personal assets, upon a bill against the administrator *de bonis non*. If the personal estate be fully administered, the same equity exists against the heir. The payment by the administrator was not officious. It is not the act of a stranger, who endeavors to make one his debtor by payments on his account, against his will and without his request. If indeed, the administrator had known the personal estate was insolvent, and voluntarily paid debts beyond it, that might be taken to be with a view of intermeddling with things that did not concern him, and place him on the footing of an officious stranger. He would not be permitted by an act of mere unauthorized forwardness, beyond his known obligations and duty, to make himself the creditor of the heir, and draw into this jurisdiction a question purely legal—debt or no debt. But the bill states here the embarrassments of the estate, its large but uncertain amount, and that the payments were made by the administrator from the best motive, namely to save costs, and promote the interest of the defendants, who were his nephews and nieces. I think a demand thus arising cannot but be felt by every body to be just, and entitled to satisfaction in some court.

But an administrator, knowing the personal estate to be insolvent, had made such payment, with an intent to make the heir his debtor, and withdraw the question of fully administered from the proper forum, he would be entitled to no relief.

Then as to the jurisdiction of this court: It is denied, because there is a remedy at law. It is said that the question of *debt* or not, is one of law. True; but for many debts which the law recognizes, a remedy may be sought in equity. Thus debt by simple contract to the executor himself may be enforced here, and a discovery had of the real estate. In truth, however, the demand of these plaintiffs is not a debt for which an action would lie at

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law, either against the heir or administrator *de bonis non*; or at any rate, it is a very doubtful right. It is for money paid by the first administrator himself. Can that be said to be a debt *from the intestate* to the administrator, for which an action at law can be sustained against the heir or administrator *de bonis non*, as such? I suppose not, because it had its origin since the death of the intestate. It is only a debt in this court, upon its principle of substitution; which places the administrator here, as the law does an assignee of the debt. No injury can arise to the heir, but rather a benefit by the jurisdiction. The personal estate is still the primary fund, and hence the administrator *de bonis non* is a necessary party, and the heir is at full liberty to show assets in the hands of either the first or last administrator. The debt is fixed conclusively by a judgment at law against the administrator, unless the heir can show collusion. But here he is at liberty to contest the debt himself, with the aid of the administrator.

But even if there was a remedy at law, it must involve an account of the whole administration by the first administrator; and that *per se* is a proper ground of jurisdiction in equity, concurrently with a court of law.

PER CURIAM.—Declare, that the plaintiffs have the right in this court to be substituted in the place of those creditors of the intestate, whose debts the testator of the plaintiff paid in good faith, so far as those debts exceeded the personal assets of the intestate, which came to the hands of the plaintiff or their testator: Declare further, that such right of substitution exists against the present personal representative of the intestate, and against his heirs, after the personal estate shall have been exhausted; and reverse the decree of the court below, with costs against the appellees, and remand the cause.

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SAMUEL CHUNN v. DAVID MCCARSON.

Courts of equity in this State will not sustain a bill to enjoin a judgment at law upon a money demand, where the amount in controversy does not exceed fifty dollars.

This was an injunction bill, originally filed in Buncombe. The bill alleged, that in the year 1816, the plaintiff had, at the request of the defendant, given his bond for thirty dollars, to one *Stokely*, in discharge of a debt due *Stokely* by the defendant. That soon afterwards the bond was presented to the defendant, and was paid by him; but instead of cancelling it, the defendant had taken an assignment of it to himself. That afterwards, extensive partnership accounts subsisted between the plaintiff and the defendant, which eventuated in a lawsuit, and finally in a compromise, upon which the defendant signed the following receipt: "I hereby "relinquish to *Samuel Chunn* all claims, debts, dues "and demands, of whatsoever nature, up to this date, "against the said *Samuel*. April 12, 1823."

"DAVID MCCARSON."

That after this compromise, the defendant had sued out a warrant upon the note to *Stokely*, upon which the magistrate had rendered a judgment in favor of the plaintiff. That the defendant had appealed, and the cause had finally been decided against the plaintiff in the Superior Court. The bill prayed for an injunction and discovery.

The defendant, in his answer, denied all the allegations of the bill, and insisted that the acknowledgment above mentioned did not apply to the note, which he averred had been satisfactorily proved on the trial at law.

The cause was heard upon the bill and answer, and was submitted without argument, by *Winston*, for the plaintiff, and by *Gaston*, for the defendant.

RUFFIN, Judge.—There is no testimony in this cause; and the equity of the plaintiff's case is answered and fully denied by the defendant. The receipt set forth in

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A receipt not under seal, is only evidence of satisfaction, and may be explained by parol testimony.

the bill is not under seal, and so only evidence of a satisfaction, and was open to explanation by either party on the trial at law; and the defendant says it was explained on that occasion, to the satisfaction of the jury; who found that the present demand was not included in the settlement, on which that receipt is founded.

The court is gratified in coming to the conclusion to dismiss the bill on the merits, rather than on a principle which has not been often acted on in this State, and of which the profession is perhaps not fully apprized.

The bill is for an injunction and relief against a judgment at law for a debt of thirty dollars. The sum is too small to call the powers of this court into action. In England, the chancellor will not take jurisdiction of a money-demand of less than £10 sterling. There are besides other limitations on litigation in that court. For example, no appeal or bill of review lies for error as to costs, though they may exceed that sum—being a thing in discretion. The distinguished chancellor of New-York, who has given reputation and a system to the court of equity in that State, hath adopted a like rule. (*Moore* v. *Lytle*, 4 *Johns. C. R.* 183 *Fullerton* v. *Jackson* 5 *Id.* 276). This court may well be justified in following examples so salutary. It is not that a court of equity hath not regard to rights, and doth not hold them sacred, however inconsiderable the subject, which induces the court to refuse to enforce them. But the policy of the country, and the true interest of the parties, forbid fruitless litigation. No court, which has a discretion on the subject, ought to entertain a controversy, in which the costs *must* exceed the sum demanded. And the institution of such a suit indicates such a wanton passion for judicial contest, regardless of consequences even to the complaining party, as it were criminal in a court to gratify. The present is an instance of the evil effects of such a temper. The suit at law began before a justice of the peace, and went by appeals to the County Court and to the Superior Court; and finally, nothing yielding, the defendant at law claims the assistance of this court. The proceeding involves such a

waste of time and expenditure of money, as to place in a strong light the propriety of a declaration by the court of some restriction on parties, and of some limitation on the jurisdiction. It is impossible that a bill lie for any sum, however small. There must be some point, at which we must stop. And the court can fix upon none apparently more apt, than the reasonable average of the costs of a suit in this court; which is fifty dollars. That too is the amount in New-York. Perhaps, seeing that the legislature hath prohibited a jurisdiction in courts of law of contracts for less than sixty dollars, the court might more properly adopt that sum. But as other courts of equity have adopted the smaller sum, so will we. For the recovery of a money demand, or for relief against a judgment, or legal security for a debt, less than *fifty dollars*, the court will not, in future, entertain a bill.

PER CURIAM.—BILL DISMISSED.

SAMUEL McBRAYER *et al. adm'rs. of* WM. McBRAYER
v.
MARTIN ROBERTS.

A court of equity is bound by the statute of usury, and although upon the bill of the borrower, aid will be extended only upon the terms of his repaying the sum lent with interest, yet the lender can have no relief whatever, and his bill to foreclose an usurious mortgage will be dismissed.

This bill was originally filed in Rutherford, and sought to foreclose a mortgage of slaves. It charged that the intestate of the plaintiff lent to the defendant, on the 4th of June 1808, the sum of $260, and to secure it, took a bill of sale for the negroes mentioned in the bill, which had been limited to the defendant by will after a life estate to two others. The deed was exhibited with the bill, and was absolute upon its face, and purported to be in consideration of $260; but the plaintiffs admitted that it was intended only as a security: and that

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McBrayer executed to the defendant at the same time a defeasance, declaring the deed to be void upon payment of the sum lent ($260) with interest, at the end of two years. The bill charged that the tenants for life were both dead; and that the defendant had lately come into possession.

The defendant in his answer admitted the bill of sale, and the loan of money; but averred, that instead of $260, the amount loaned was only $208, upon an usurious contract. He charged that the intestate was to lend him $260, and did count it out; but that he immediately took back $52, for the interest in advance for two years; and that he then executed the defeasance to avoid the conveyance upon the payment of $312, on the 14th of June 1810.

The defeasance was filed by the defendant as an exhibit, and was proved by the subscribing witnesses. The evidence was very short, and will be found stated in the opinion of Ruffin, Judge.

Hogg, for the plaintiff contended, 1st. That there was no loan, but a conditional sale, and of course that no usury could exist, and cited *Murray* v. *Harding* (3 *Wils.* 390.)

2d. That the plaintiff had a right, supposing this to be a conditional sale, to the aid of the court, because his title was not recognized at law. (*Theobolds* v. *Duffoy*, 9 *Mod.* 102.)

No counsel appeared for the defendant.

Ruffin, Judge, after stating the case as above, proceeded as follows: Upon the face of the transaction, as stated by the parties, it is clearly a mortgage, to secure a debt contracted upon an usurious consideration.

The depositions of the subscribing witnesses to the bill of sale and defeasance have been taken. One of them disclaims any recollection of any of the incidents, except his attestation. The other directly sustains the answer. Indeed, if the whole sum of $260 had been advanced, the sum of $312 mentioned in the defeasance, would itself prove the usury; as it is an excess of $20 80 above the legal rate of interest. And at any rate, it supports the statement of the answer and of the witness.

Upon the case thus taken, the plaintiffs can have no relief in this court; which can no more disregard the statute than a court of law. If the plaintiff can make any thing at law of his legal title, he is at liberty; and when the borrower comes here, we will make him do equity, by paying the sum borrowed, and the lawful interest, as the price of our assistance. But when the lender asks aid of equity, he must ask it on a contract not tainted by an unlawful and corrupt ingredient.

But it is urged for the plaintiff, that here is no usury; because there was no loan, and the premium was no more than a fair compensation for the risk of losing the property, considering it as a conditional sale. The risk is supposed to consist in the perishable nature of the thing, namely, slaves, and the danger of their loss by being removed by the tenants for life, or the expense of securing them by process in this court. And the argument that there was no loan, is founded upon the fact, that no security was taken for the repayment of the money; and so there was no obligation on the borrower; and if the negroes died or were removed, the loss must fall entirely on *McBrayer*.

The argument upon the nature of the contract might admit of consideration, if the cause turned upon any construction now to be put upon it by the court. We think, indeed, that the contract itself, if its character were now to be determined by the court, is plainly proved, by the express provisions of it, and the testimony of the witness, to be usurious. But if this were not so, the court could not help the plaintiffs upon this bill. Because mortgage, and loan or not, is a question not open upon the pleadings. The bill itself states it to be a loan of $260, and declares the conveyances to have been intended as a mortgage and security. Now, tho' the court is at liberty to construe a contract, and put a meaning upon the words of it, according to the sense in which the parties used them, however improper that may be, and contrary to their true import, yet no such liberty can be taken with pleadings. The plaintiff, with the aid of counsel, puts a construction upon the bargain,

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and admits it to be of a particular character, and upon it, as such, seeks a particular relief. Treating the contract to be of that sort, when the case turns out against him, he cannot ask the judge to declare the contract to be different, and to give him a different relief. Here the bill charges a mortgage, and prays a foreclosure. Where the debt secured, if a debt, is proved to be usurious, we cannot, against the bill, say it was not a mortgage, but a sale. A party must be bound conclusively by his statement of facts, put plainly upon the record. If not, there is no certainty in judicial proceedings; and a bill making one case may be supported by proof of one diametrically opposite.

Where the bill alleges a transaction to be a loan and a mortgage, and seeks a foreclosure, the plaintiff cannot at the hearing ask relief as upon a conditional sale.

Before I conclude, I will make an observation upon the position, that there was no loan, because no security nor covenant was taken for the repayment. The want of such a covenant, or a separate bond for the money is certainly one of the *indicia* of a sale; as the giving of such a security is alike evidence that the conveyance, though absolute in its terms, was in reality a mortgage. But it is nothing more than one evidence amongst many, of the character of the transaction. For when it is established, that the advance of the money was, not as a price, but as a loan, the loan *ex vi termini* raises and involves a promise to pay, as obligatory as a separate agreement under seal to the same effect. And this promise binds the party personally; so that the loss of the pledge does not include the loss of the debt; but the creditor may still proceed against the debtor himself. A loan therefore in its terms includes a debt from the borrower; which it is not necessary should appear upon the mortgage, or in writing; though certainly it is safest that it should, to put the fact—of loan or no loan—beyond dispute.

On the inquiry whether a conveyance of slaves be a mortgage or a conditional sale, the fact that no bond is taken to secure the money advanced, is only one evidence of the character of the transaction.

PER CURIAM.—BILL DISMISSED.

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ANDREW ALLISON v. GEORGE L. DAVIDSON *et al.*

All the members of a partnership are necessary parties to a final settlement of the partnership accounts; and if after such settlement one leaves his share in the hands of the acting partner, he does so at his own risk. But if pending an account, and before its settlement, one of the partners receives his share of the profits without the consent of the others, upon the insolvency of the acting partner, he must account with the others for the amount thus received.

This bill was originally filed in Iredell, in 1822, and was amended in the following year. It charged, that in the year 1817, the plaintiff entered into partnership with the defendant *Davidson*, and with *Robert Worke* and *Robert Simonton*, who were also defendants, for the purchase of slaves in this State, and the sale of them in the State of Mississippi—that each partner was to advance $4000, and that the profits were to be equally divided. That in pursuance of this agreement, a large number of slaves were purchased, which were carried by the plaintiff and *Simonton* to Natchez, in the State of Mississippi, and there sold. That a very large profit was made upon this adventure. That *Simonton* had, while at Natchez, the charge of the slaves, and received the money upon cash sales, and was the active partner. That in the year 1818, the plaintiff received from *Simonton* the capital advanced by him; but that all the defendants had, upon various pretences, refused to come to a settlement with the plaintiff, and pay him his share of the profits. The prayer was for an account, and for payment of the plaintiff's share of the profits.

The defendant *Simonton*, in his answer, stated, that previous to the year 1817, a copartnership had subsisted between the other defendants and himself, in the purchase and sale of slaves—that in the year 1816, they sold a large number on credit in the State of the Mississippi, and upon the debts becoming due, it was determined that the person who went to collect them, should carry out a number of slaves with him—that *Worke* had left Iredell for the purpose of making purchases of slaves, and himself and *Davidson* were to have followed him,

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when he met the plaintiff's father, who proposed that the plaintiff should be taken into their copartnership, observing that as the plaintiff was a very young man, and entirely inexperienced, he did not expect him to be admitted upon terms of perfect equality, and that he, the father, was principally anxious to get the plaintiff into business, and enable him to acquire some knowledge of it from experience. That he, *Simonton*, being upon terms of great intimacy with *Allison*, the elder, replied that he was willing the plaintiff should be admitted, but that his admission must finally depend upon its meeting with the approbation of *Davidson* and *Worke*. He denied that any other agreement as to the admission of the plaintiff, was ever made, and admitted, that $4000 was advanced by *Allison*, the elder, for the benefit of the plaintiff, in the speculation then on foot.

The answer contained a discovery as to the purchase and sale of the negroes. To an amendment averring that he had executed a memorandum in writing, whereby the plaintiff was declared to be equally interested in the profits, he answered that he had no recollection thereof.

The defendants *Davidson* and *Worke* both denied the right of the plaintiff to an account. Before the cause was set for hearing, both *Simonton* and *Worke* died—the former, having appointed the defendant, *Davidson*, and *Theophilus Falls* and *James Campbell*, executors; the latter, his wife, and *John Mushat*, who were severally made parties by *sci. fa* and all denied assets liable to the plaintiff's demand.

Replications were taken to the several answers, and depositions filed; in one of which a written memorandum of *Simonton* was proved, whereby he declared the plaintiff interested in one fourth of the negroes "now buying."

At December term, 1829, by an interlocutory order, the right of the plaintiff to an account was established, and a reference of the partnership dealings was directed, and also an account of the assets of *Simonton* and *Worke*.

At this term, the clerk reported, that the net profits of the partnership dealings amounted to $ 9,507 10, of which each partner was entitled to $ 2,376 25 —that a capital of $ 4180 was advanced by the plaintiff, and $ 4420 91 by each of the defendants —that *Simonton* received for cash sales at Natchez, $ 20,275—that at the same time sales to the amount of $ 6,125 were made upon a credit, the notes for which were taken payable to *Simonton*—that after crediting him with his own capital and profits, and the capital of *Davidson* which it was admitted by the latter was advanced by him, he owed to the copartnership $ 8,794 88. In relation to this balance, the clerk reported specially, that *Simonton*, *Worke* and *Davidson*, had been copartners in business before the year 1817—that *Simonton* and *Worke* both died before a settlement of their various copartnership dealings had taken place —that the executors of *Worke* filed a bill against the executors of *Simonton*, for an account—that the matter in dispute had been referred to an arbitrator, who had decided that the executors of *Simonton* owed the executors of *Worke* $ 6,127 89, which had been paid them. That there was no direct evidence before him, whether the whole, or any part of this sum was on account of *Worke's* capital and profits in the partnership, of which the plaintiff was a member; but from the fact that nearly all the partnership effects were in *Simonton's* possession, he inferred that those profits and that capital did constitute a part of the said sum of $ 6,127 89.

As to the sum of $ 6,125, the amount of credit sales at Natchez, the clerk reported that $ 4,967 thereof had been collected by *Davidson*, to whom *Simonton* had delivered the bonds—that upon *Davidson's* return from that place, he paid *Simonton* $ 3,463, and retained in his own hands $ 1,504, and that *Falls*, one of the executors of *Simonton*, had, since the death of his testator, received from the agent who collected the debts, the balance thereof, including interest, amounting to $ 761 90. That *Davidson* had received of the partnership effects the sum of $ 1,504 above mentioned, and also $ 1480 85,

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remitted him by the agent charged with the collection of the bonds given upon the credit sales. That at the death of *Simonton*, there existed an unsettled account between him and *Davidson*—that this account was, by an agreement between *Davidson* and his co-executors, referred to arbitration, and that *Davidson* charged *Simonton*, and was allowed by the arbitrators, the sum of $3,250, as his share of the profits of this copartnership—that the balance in *Davidson's* favor, and which was awarded him, after sundry credits, and among them the sum of $1,504 above mentioned, amounted to $2,389 98, and that, in entering up judgments, against the executors of *Simonton*, *Davidson* had uniformly retained this sum.

The clerk also reported, that the plaintiff was entitled to interest upon the amount due him, as follows, viz. upon three fourths thereof from the time when the copartnership operation closed, the 1st June, 1818, and upon the balance from the 1st of June, 1819.

The clerk reported upon the account of *Worke's* and *Simonton's* assets; but as it was agreed by the counsel at this term, to discuss the cause only so far as the defendant *Davidson* was personally liable to the plaintiff, upon the supposition that both *Worke* and *Simonton* died insolvent, it is unnecessary to state the result.

After the exceptions mentioned below were filed, the clerk, in a supplemental report, stated that he had overlooked an admission of *Simonton's* in his answer, which proved that he had improperly charged the defendant *Davidson* with the sum of $1,430 85, and that it was properly chargeable to *Simonton*.

The plaintiff excepted to the report, as follows:

1st. Because the master had not charged *Davidson* with the sum of $3,250 retained by him as his share of the profits of the copartnership.

2d. Because the clerk had not charged *Davidson* with all the money received by *Simonton*, so as to render him liable for the plaintiff's capital and profits.

3d. Because the clerk had not charged *Davidson* with the full amount of cash actually received by him, but only with that which he retained out of collections made at Natchez.

Other exceptions were filed as to the liability of *Worke's* executors. One of which was, that the clerk had not charged the executors of *Worke* with the share of the profits which he had received. These exceptions were not argued.

The defendants *Davidson* and *Falls* excepted, 1st, Because the clerk had improperly charged the former with $1,430 85, as received from the agent at Natchez. 2d, because it did not appear whether the sum of $761 90, mentioned in the report as having been received by *Falls*, was partnership effects, or the separate property of *Simonton*.

Of these two exceptions, the first was admitted by the counsel of the plaintiff to be well founded. The second was withdrawn by the defendants.

Badger & Devereux, for the plaintiff, upon the questions raised by these exceptions, contended,

1. That upon the dissolution of a copartnership, partners are trustees for each other; that each of them has a lien upon the partnership effects for the security of his capital and profits, and that every partner is liable to the other for funds which came into his hands. (*Williams ex parte* 11 *Ves.* 3 *Crawshay* v. *Collins* 15 *Id.* 228 *S. C.* 1 *Jac & W.* 267. *Heathcote* v. *Hulme Id.* 122 *Kendal ex parte* 17 *Ves.* 514 *Rowlandson ex parte* 2 *Ves. & Bea.* 172 *Crawshay* v. *Maule* 1 *Swans.* 507 *Featherstonhaugh* v. *Fenwick* 17 *Ves.* 313 *Long* v. *Majestre* 1 *Johns. C. R.* 305).

2. That *Davidson* having denied the plaintiff's right to an account, he had rendered himself liable to the plaintiff for the balance due him, upon the same principle that a conversion made the defendant at law liable for the value of the thing converted. (3 *Kent's Com.* 27. *Griswold* v. *Waddington* 16 *Johns. R.* 491 *Marquand* v. *New-York Manufacturing Co.* 17 *Id.* 525 *Featherstonehaugh* v. *Fenwick* 17 *Ves.* 298).

3. That *Davidson*, *Simonton* and *Worke*, fraudulently conspired to defeat the plaintiff of his rights, and were liable to him *in solido* for the amount due him. (*Bridgeman* v. *Green* 2 *Ves. sen.* 627 *Huguenin* v. *Baseley*, 14 *Ves.* 273).

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4. That the plaintiff and *Davidson*, being equally interested in the partnership, ought to share equally in the result, and hence upon the maxim that "equality is equity." *Davidson* ought to account with the plaintiff for the money he had received and appropriated to his own use. (*Peacock* v. *Peacock* 16 *Ves.* 49. 3 *Kent* 627 *Finele* v. *Stacey Gow* 120).

Gaston, for the defendant *Davidson*, contended, that there had been no fraud on the plaintiff, nor any denial of his right. That upon the cases cited, he was in no way liable to the plaintiff, as *Simonton* was the settling partner, and all payments were properly made to him. He urged very strongly, that upon the dissolution of a copartnership, the profits became a debt due by the settling partner to each of his copartners: and that every one of them had the right to receive his share from him, without accountability to the others.

RUFFIN, Judge.—It has been contended, on behalf of the plaintiff, that *Davidson* is liable for the insolvency of *Simonton*; because this, being a limited partnership, was dissolved on the completion of the trip: and after dissolution, each partner has a lien on the effects for his share, and each is, to as the funds in his hands, a trustee for the others for their shares, made several by the dissolution.

After the dissolution of a partnership, each partner is a trustee for the others as to the partnership funds in his hands. But if one of them pays over to the acting partner the partnership effects, unless *mala fides* be proved, he is not liable upon the insolvency of the latter.

This proposition must be qualified at least thus far: that the expiration of the term leaves the copartnership in existence for the purpose of closing its concerns. And if, by the terms of the agreement and course of the business, it is plain that one of the partners was to close it, was to be the acting and managing partner, a deposit of the effects of the firm with that partner, by another is justifiable. Such a deposit is taken as made for the purposes of the business, that is, to collect the effects into one fund, in the proper hand for adjusting the accounts, ascertaining the profits, and making actual division. That, in such a case, is to be taken as the intent, until bad faith is made to appear. It is to be so taken, because it was so agreed. This repels the idea, that the

payment to the acting partner of the money, in which another partner had a share, was to defeat this latter one, and so in breach of trust. A partner, thus holding property, after the dissolution, may be a trustee for each of the others severally. But he is only liable as other trustees. He is not bound to pay to each one personally his share of that money, if, by the agreement, the whole was to be paid to a particular partner for division. For then the payment to the partner, who is the general receiver, is according to and in execution of the trust.

In the case before the court, it is plain that this last was the nature of the agreement or understanding of the parties. The *whole* business had been conducted in the name of *Simonton alone*. The plaintiff accompanied him to Natchez to make sales. Yet the sales were made by *Simonton*; he received all the money, altho' the plaintiff was present, and did not even then return his capital; the bonds for the price of the negroes sold on credit were made payable to *Simonton*. He was looked to and trusted by all parties; and more particularly by the plaintiff, who alone went with him in person on the trip. The next year *Davidson* received the bonds from *Simonton*, and went out to Natchez to collect them. He did collect $4967 thereon, and on his return paid to *Simonton* the sum of $3463 and retained $1504. The clerk has charged him with this last sum; and the plaintiff excepts, because he has not charged *Davidson* with the whole sum of $4967. If the payment had been wrongful; if it had been against the agreement; if it had not been according to the agreement, the exception might be well founded. But under the understanding existing in this case, which we are obliged to see from the circumstances, the payment to *Simonton* was a proper one. And therefore this exception is overruled.

It is said, however, that the denial of the plaintiff's right, and of the partnership by *Worke* and *Davidson*, amounted to a combination to defeat the plaintiff by placing the funds in *Simonton's* hands, out of his reach; and so amounted to a conversion; and that renders each liable for the other.

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If several partners conspire to defraud their co-partner out of his share of the profits; and act with a view to effect that purpose, *it seems*, that each is liable for the balance due such co-partner, on an adjustment of the partnership accounts.

If the purpose of paying the money into *Simonton's* hands; or if the purpose of denying the plaintiff's right in the answer, was that the money might be there, with a view of defeating the plaintiff of rights clearly known to those defendants, a case of flagrant fraud and perjury would be made out, which would induce the court, as far as possible, to reinstate the plaintiff out of the effects of the defendants. But it does not appear, that *Worke* and *Davidson* did know the terms on which *Simonton* had admitted the plaintiff. And if they had, it does not appear, that the payment to *Simonton* was designed to defeat the plaintiff, or that he objected to such payment. On the contrary, *Simonton's* hands were those which the plaintiff wished to hold the money. He had no confidence in the others—he had in *Simonton*, and looked to him for what he was entitled to. The bill is filed upon the foundation that *Simonton* had, and rightfully had the money. The others are not made parties for the sake of relief against them; but because they were necessary parties, against whom the partnership was to be established, and between whom the division of profits was to be made. The liability of *Worke* and *Davidson* for *Simonton* is an after thought, inconsistent with the scheme on which the bill is framed, and inconsistent with the true agreement between the plaintiff and *Simonton*. That those defendants must have been aware of an interest of some sort in the plaintiff—of a kind of partnership—cannot be doubted. But both sides trusted to *Simonton* to determine the particulars, and as the link of their union. And whatever might be the extent of the respective interests, the general fund was to be in *Simonton's* custody. The court therefore sees nothing in this part of the case more than in the other, to make either of those persons liable for more than remains in his hands. And therefore the second exception of the plaintiff is overruled.

But that each of these defendants is respectively liable for what he has in his hands, seems equally clear. When a partnership is closed by stating a final account, ascertaining the amount of the general fund, and of the shares of each partner, each hath a right then to

receive that share. If one gets in from the holder his share, as his share, and another delays to take his, but leaves it in deposit, it must be taken that he leaves it as his own, and not the property of the whole. Each partner is necessarily a party to such an adjustment in fact, as well as interest, and must know the state of his property. He leaves it at his risk; and if the general receiver fail, the loss is that of the individual who trusted him. But until the concern be closed by taking a final account, there is no power in any number of the partners, to the prejudice of another, to declare either the sum, or the shares of profits. And any effects of the concern received by one, remain, in respect to the rights of the excluded partner, joint property. Upon a loss of the residue, he has a right to resort to any one for his proportion of the effects in his hands. The injured partner has never consented to his receiving them as his own; and is therefore not bound by the division. It is true, he who has thus got a part, may point out to the other how he may get his share—where the fund for his satisfaction may be found—and so far as that will go, he shall take it, and not disturb what has been done. But the arrangement is no further obligatory. For example: *Falls* has here $761 90, said to be of the partnership effects. If that turn out so, that will do to satisfy *Allison pro tanto*, and he shall look to it, if it can be got. But if it cannot be got, the loss must fall on all three of these partners, *Allison*, *Worke* and *Davidson* equally; and the two last must make a common stock, for the three, of the monies in their hands, because, as to the plaintiff, it remains joint stock; though as between themselves and as between them and *Simonton*, it is several. Wherefore the exception as to the liability of *Worke's* executors is allowed, because it is reported, that the executors of *Worke* have received his capital, viz: $4,420 92, and full share of the profits, viz: $2376 27½, and yet the clerk hath not charged him with the latter sum, or any part thereof. As to the plaintiff, that remains a joint fund, for the payment of profits.

A partner, who has received none of the profits, must first exhaust the partnership effects existing in specie, before he can compel contribution from a partner who has received his share.

Where of four partners one died insolvent, largely indebted to the partnership, and two others without the consent of the fourth, received their shares from his executor, the sum so received remains, as between the survivors, joint stock.

The question yet remains, with what sum is the defendant *Davidson* to charged? The clerk states an account,

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in which he is charged with the sum of $ 2934 85, which he collected of the funds in Mississippi, and gives him credit for the sum of $ 2376 27½ for his profits; leaving a balance in his hands of $ 558 57½. To an item of $ 1430 85 of those debits this defendant excepts; and the exception is allowed, because the evidence is, that *Simonton* received that sum, and not *Davidson*. This reduces the sum chargeable to *Davidson*, to $ 1504, which he retained as before mentioned. That sum this defendant claims, and the clerk submits the propriety of the claim, as for his own profits. This claim the court has already discussed, and disallows upon the principle on which the exception relating to the liability of *Worke's* executors was allowed.

Where an acting partner dies insolvent, having appointed one of his copartners executor, who retains his profits as a debt due from the testator, he is bound to account with the other partners for the sum retained.

Is that the only sum which the plaintiff has a right to consider as joint property in his hands? This brings me to consider the first exception. That relates to this state of facts: *Davidson* is one of the executors of *Simonton*, and by arbitration between him and his co-executors, their accounts were settled after the death of the testator. Upon that occasion, *Davidson* gave *Simonton* credit for the sum of $ 1504, and charged him with the sum of $ 3250, as "his fourth part of profits on sale of negroes the last trip to Natchez," and a balance was awarded to *Davidson*, which he has retained. This was an excess of $ 873 72½ above his actual profit. It has been contended for, first, that this excess alone is open to *Allison*, because he received the other as his own profit. That has been already answered. Next, that no part of it is accessible to *Allison*, because there are judgments against *Simonton's* executors for a very heavy amount, on specialties, not satisfied, and that *Davidson* will be bound to answer for this sum as assets, to those creditors. If such were the facts, the court would not take them now: for if the act, by which he attempted to appropriate that sum to his own satisfaction, did not effectually appropriate it, it must be left for the benefit of those, whose legal priorities would overreach both these parties. But such is not the case. In taking all the judgments *this retainer has been allowed*, and the judgments (rendered since

the receipt of the assets, and the appropriation of this portion of them) are all *quando*; as appears from the report of *Simonton's* estate, which the defendant does not except to. Those judgments never can reach this money. (*Mara* v. *Quin.* 6. *T. R.* 1.) The case is then this: that this defendant has retained the money upon a ground, which as between him and the plaintiff, is for their joint benefit, and it can never be taken from him by any body having a better right. Can he be permitted to keep off the plaintiff by allegation, that he ought not to have retained at all. The very proposition pronounces its own answer. For these reasons, the plaintiff's first exception is allowed.

Where an acting partner takes bonds payable to himself for partnership debts and dies, in equity these bonds are copartnership effects.

The defendant *Falls* excepts to the clerk's report, charging him with having the sum of $761 90 of the partnership effects in his hands. This sum was received by him since the death of *Simonton*, as the balance due on bonds taken on the sale of negroes. That fact is clear. The bonds were payable to *Simonton*, who transacted the business; which enabled *Falls* to collect them. But they are not the assets of *Simonton*. They are, in this court, the effects of the copartnership, and belong to the surviving partners. If the partnership property cannot be traced, it necessarily falls into the general funds of the possessor, as money. But if it remain in specie or securities, it is joint property and survives. Wherefore the exception of *Falls* is overruled.

The effect of these several judgments is, that *Falls* must pay into this court for the use of the plaintiff the said sum of $761 90, with interest thereon from this day, unless the whole be paid to the clerk or the plaintiff within thirty days, and in default of such payment within that time, that execution issue therefor with interest as aforesaid. As it does not appear, that *Falls* is insolvent, that sum must be taken, for the present, as available to the plaintiff, and therefore the residue of the plaintiff's stock, namely, $ 180, with interest thereon from the 1st day of June 1818, to the 1st day of September 1831, viz: $145 80 making together the sum of

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$325 80 must be first satisfied thereout, which will leave a balance thereof of $466 10 applicable towards the plaintiff's profits. The sum then due to the plaintiff as principal money, by way of profits, will be $1910 17½ which with the profit of $2376 27½ belonging to the defendant *Davidson*, makes an aggregate of $4286 45; towards which the said sum of $3250, received and retained by *Davidson*, is applicable to the respective profits belonging to each—namely, to *Davidson* the sum of $1858 05, and to *Allison* the sum of $1391 95 with interest on the sum of $927 95 (part thereof) from the 1st day of June 1818, and $418 (the residue thereof) from the 1st day of June 1819, until paid: and it is decreed that execution may forthwith be sued therefor.

This sum is thus ordered to be presently raised from the defendant *Davidson*, as that which the plaintiff will be entitled to receive from him, upon the supposal, that *Robert Worke's* estate is insolvent. Equity will adjust the loss equally between the three; but at present the estate of *Worke* is reported insolvent, and the counsel have not thought proper to dispose of the report upon that part of the case. Should it turn out to be otherwise, that estate will hereafter be compelled to pay its proportion of the plaintiff's demand, and *Davidson* will then stand in the plaintiff's shoes, for such sum as he hereby is made to advance, which *Worke's* estate ought in the first place, if able, to do.

All the said matters are ordered and decreed accordingly; and the other matters excepted to, and all the other questions appearing upon the report and pleadings are reserved for the further decision of the court.

PER CURIAM.—DECREE ACCORDINGLY.